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International Court of Justice

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Official transcript of the International Military Tribunal in the matter of The United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics, against Hermann Wilhelm Goering et al, Defendants, sitting at Nurnberg, Germany, on 28 February 1946, 1000-1030, Lord Justice Lawrence presiding.

DR. HORN (Counsel for Defendant Ribbentrop): Mr. President, when on Monday I made my motion to call the witness Winston Churchill, and when I wanted to bring grounds, the Court asked me to present that in writing so that the Tribunal may make a decision.

The decision about not calling the witness Winston Churchill has already been made, on the 26th of February, before the Tribunal has received my written statement. I assume that there must be a mistake, and I ask the Tribunal, under consideration of the reasons for my written motion, to reconsider that question.

THE PRESIDENT: The Tribunal will reconsider the matter. Do you propose, Mr. Justice Jackson, to argue first on the question of the organizations?

MR. JUSTICE JACKSON: If that is agreeable to the Tribunal. We are taking up, as I understand it, the deferred subject of the rules which should guide in governing the criminality of organizations, partly upon our initiative and partly in response to the questions propounded by the Tribunal.

The unconditional surrender of Germany created for the victors novel and difficult problems of law and administration. Being the first such surrender of an entire and modernly organized society, precedents and part experiences are of little help in guiding our policy toward the vanquished.

The responsibility implicit in demanding and accepting capitulation of a whole people certainly must include a duty to discriminate justly and intelligently between the opposing elements of that population which bore dissimilar relations to the policies and conduct which led to the catastrophe. This differentiation is the object of those provisions of the Charter which authorize this Tribunal to declare organizations or groups to be criminal.

Understanding of the problem with which the instrument attempts to deal is essential to its interpretation and application.

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One of the sinister peculiarities of German society at the time of the surrender was that the state itself played only a subordinate role in the exercise of political power, while the really drastic controls over German society were organized outside of the nominal government. This was accomplished through an elaborate network of closely knit and exclusive organizations of selected volunteers, both bound to execute without delay and without question the commands of the Nazi leaders.

These organizations penetrated the whole German life. The country was subdivided into little Nazi principalities of about fifth households each, and every such community had its recognized Party leaders, Party police, and its undercover spies. These were combined into larger units with higher ranking leaders, executioners, and spies, the whole forming a pyramid of power outside of the law, with the Fuehrer at its apex, the loval Party officials constituting its broad base, which rested heavily on the German population.

The Naze despotism, therefore, did not consist of these individual Def endants alone. A thousand little fuehrers dictated; a thousand imitation Goerings strutted; a thousand Schirachs incited the youth; a thousand Sauckels worked slaves; a thousand Streichers and Rosenbergs stirred up hate; a thousand Kaltenbrunners and Franks tortured and killed; a thousand Schachts and Speers and Funks administered and supported and financed this movement.

The Nazi movement was an integrated force in every city and county and hamlet. The Party power resulting from this system of organizations first rivaled and then dominated the power of the state itself. The primary vice of this web of organizations was that they were used to transfer the power of coercing men from the government and the law to the Nazi leaders. Liberty, self-government, and security of person and property do not exist except where the power of coercion is possessed only by the state and is exercised only in obedience to law. The Nazis, however, set up this private system of coercion outside of and in immunity from the law, with Party controlled concentration camps and firing squads to administer privately decreed sanctions.

Without responsibility to law and without warrant from any court, they were enabled to seize property and take away liberty and even take life itself.

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These organizations had a calculated and decisive part in the barbaric extremes of the Nazi movement. They served chiefly to exploit mob psychology and to manipulate the mob. Multiplying the numbers of persons in a common enterprise always tends to diminish the individual's sense of moral responsibility and to increase his sense of security. The Nazi leaders were masters of this technique. They manipulated these organizations to make before the German populace impressive exhibitions of numbers and of power, which have already been shown on the screen. These were used to incite a mob spirit and then riotously to gratify the popular hates they had inflamed and the Germanic ambition they had inflated.

These organizations indoctrinated and practiced violence and terrorism. They provided the systematized, aggressive, and disciplined execution throughout Germany and the occupied countries of the plan for crimes which we have proven. The flowering of this system is represented in the fanatical SS General Ohlendorf, who told this Tribunal without shame or trace of pity how he personally directed the putting to death of 90,000 men, women and children. No tribunal ever listened to a recital of such wholesale murder as this Tribunal heard from him and from Wisliceny, a fellow officer of the SS. Their own testimony shows the SS responsibility for the extermination that organization welcomed and discharged methodically, remorselessly and thoroughly. These crimes with which we deal are unprecedented, first because of the shocking numbers of victims. They are even more shocking and unprecedented because of the large number of people who united to perpetrate them. All scruple or conscience of a very large segment of the German people was committed to the keeping of these organizations, and their devotees felt no personal sense of guilt as they went from one extreme to another. Om the other hand, they developed a contest in cruelty and a competition in crime. Ohlendorf from the witness stand accused other SS commanders, whose killings exceeded his, of "exaggerating" their figures

There could be no justice and no wisdon im an occupation policy of Germany which imposed upon passive, unorganized and inarticulate Germans the same burdens as upon those who voluntarily banded themselves together in these powerful and notorious gangs. One of the basic requirements both of justice and of successful

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administration of the occupation responsibility of our four countries, is a seggregation of these organized elements from the masses of Germans for seperate treatment.

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That is the fundamental task with which we must deal here.

It seems beyond controversy that to punish a few top leaders but to leave this web of organized bodies in the midst of post-war society would be to foster the nucleus of a new Nazidom. These members are accustomed to an established chain of centralized command, they have formed a habit and developed a technique of both secret and open cooperation. They still nourish a blind devotion to the suspended, but not abandoned, Nazi program. They will keep alive the hates and ambitions which generated the orgy of crime we have proved. These organizations are carriers, from this generation to the next, of the infection of aggressive and rughless war. The Tribunal has seen on the screen how easily an assemblage that ostensibly is only a common labor force can be in fact a military outfit training with shovels. The next war and the next pogroms will be hatched in the nests of these organizations as surely as we leave their membership with its prestige and influence undiminished by condemnation and punishment.

The menace of these organizations is the more impressive when we consider the demoralized state of German society. It will be years before there can be established in the German State any political authority that is not inexperienced and provisional. It cannot quickly acquire the stability of a government aided by long habit of obedience and traditional respect. The intrique, obstruction, and possible overthrow, which older and established governments always fear from conspiratorial groups, is a real and present danger to any stable social order in the Germany of today and of tomorrow.

In so far as the Charter of this Tribunal contemplates a justice of retribution, it is obvious that it could not overlook these organized instruments and instigators of past crimes. In opening this case, I said that the United States does not seek to convict the whole German people of crime. But it is equally important that this trial shall not serve to absolve the whole German people except 22 men in the dock. The wrongs that have been done to the world by these defendants and their top confederates was not done by their will and their strength alone. The success of their designs was made possible because great numbers of Germans organized themselves to become

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the fulcrum and the lever by which the power of these leaders was extended and magnified. If this trial fails to condemn these organized confederates for their share of responsibility for this catastrophe, it will be construed as their exoneration.

But the Charter was not concerned with retributive justice alone. It manifests a constructive policy influenced by exemplary and preventive considerations. The primary objective of requiring that the surrender of Germany be unconditional was to clear the way for a reconstruction of German society on such a basis that it will not again threaten the peace of Europe and of the world. Temporary measures of the occupation authorities may, by necessity, and I mean no criticism of them, have been more arbitrary and applied with less discrimination than befits a permanent policy. For example, under existing denazification policy, no member of the Nazi party or its formations may be employed in any position, other than ordinary labor, in any business enterprise unless he is found to have been only a nominal Nazi. Persons in certain categories whose standing in the community is one of prominence or influence, are required to be, and others may be, denied further participation in their businesses or professions. It is mandatory to remove or exclude from public office and from positions of importance in quasi-public and private enterprises persons falling within about 90 specified categories deemed to consist of either active Nazis, Nazi supporters, or militarists. Property of such persons is blocked.

Now, it is recognized by the Control Council, as it was by the framers of this Charter, that a permanent long-term program should be based on a more careful and more individual discrimination than was possible with sweeping temporary measures. There is a movement now within the Control Council for reconsideration of its whole denazification policy and procedure. The action of this Tribunal in declaring, or in failing to declare, an accused organization criminal has a vital bearing on this future occupation policy.

It was the intent of the Charter to utilize the hearing processes of this Tribunal and its judgment to identify and condemn those Nazi and militaristic forces that were so strongly organized as to constitute a continuing menace to

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the long-term objectives for which our respective countries have spent their young lives. It is in the light of this great purpose that we must examine the provisions of this Charter.

It was obvious that the conventional litigation procedures could not, without some modification, be adapted to this task. No system of jurisprudence has yet evolved any satisfactory technique for handling a great number of common charges against a great multitude of accused persons. The number of individual defendants that fairly can be tried in a single proceeding probably does not greatly exceed the number now in your dock. Also, the number of separate trials in which the same voluminous evidence as to a common plan must be repeated is very limited in actual practice. Yet adversary proceedings of the type in which we are engaged are the best assurance the law has ever involved that decisions will be well considered and just. The task of the framers of the Charter was to find some way to overcome the obstacles to practicable and early decision without sacrificing the fairness implicit in hearings. The solution prescribed by the Charter is certainly not faultless, but not one of its critics has ever proposed an alternative that would not either deprive the individual of all hearing or contemplate such a multitude of long trials that it would break down and be impracticable. In any case, this Charter is the plan adopted by our respective governments and our duty here is to make it work.

The plan which was adopted in the Charter essentially is a severance of the general issues which would be common to all individual trials from the particular issues which would differ in each trial. The plan is comparable to that employed in certain war-time legislation of the United States dealt with in the case of Yakus v. United States, in which questions as to the due process quality of the order must be determined in a separate tribunal and cannot be raised by a defendant when he is defending on indictment. Those countries which do not have written constitutions and constitutional issues may find it difficult to follow the logic of that decision, but essentially the plan was to separate general issues relative to the order as a whole from specific issues which would arise when an individual was confronted with a charge of guilt.

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General issues under this Charter are to be determined with finality in one trial before the International Military Tribunal, and in that trial every accused organization must be defended by counsel and must be represented by at least one leading member, and other individuals may apply to be heard. Their applications may be granted if the Tribunal thinks justice requires it. The only issue in this trial concerns the collective criminality of the organization or group. It is to be adjudicated by what amounts to a declaratory judgment. It does not decree any punishment either against the organization or against individual members.

The only specification as to the effect of this Tribunal's declaration that an organisation is criminal is contained in Article 10, which, if you will bear with me, I will read:

"In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned."

Unquestionably, it would have been competent for the Charter to have declared flatly that membership in any of these named organizations is criminal and should be punished accordingly. If there had been such an enactment, it would not have been open to an individual who was being tried for membership to contend that the organization was not, in fact, criminal. The framers of the Charter, acting last summer, at a time before the evidence which has been adduced here was even available to us, did not care to find organizations criminal

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by fiat. They left that issue to determination after relevant facts were developed by adversary proceedings. Plainly, the individual is better off because of the procedure of the Charters, which leaves that finding of criminality to this body after hearings at which the organization must, and the individual may be represented. It is at least the best assurance that we could devise that no mistake would be made in dealing with these organizations.

Under the Charter, the groups and organizations named in the Indictment are not on trial in the conventional sense of that term. They are more nearly under investigation as they might be before a Grand Jury in Anglo-American practice. Article 9 recognizes a distinction between the declaration of a group or organization as criminal and "the trial of any individual member thereof." The power of the Tribunal to try is confined to "persons," and the Charter does not expand that term by definition, as statutes sometimes do, to include other than natural persons. The groups or organizations named in the Indictment were not as entities served with process. The Tribunal is not empowered to impose any sentence upon them as entities. For example, it may not levy a fine upon them even though they have property of the organization, nor convict any person because of membership.

It is also to be observed that the Charter does not require subsequent proceedings against anyone. It provides only that the competent national authorities shall have the right to bring individuals to trial for membership therein.

The Charter is silent as to the form these subsequent trials should take. It was not deemed wise, on the information then available, that the Charter should regulate subsequent proceedings. Nor was it necessary to do so. There is a continuing legislative authority, representing all four signatory nations, competent to take over where the Charter leaves off. Legislative supplementation of the Charter, of course, would be necessary in any event, to confer jurisdiction on local courts, to define their procedures and to prescribe different penalties for different forms of activity.

Fear has been expressed, however, that the Charter's silence as to future proceedings means that great numbers of members will be rounded up and automatically punished as a result of a declaration that an organization to be

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criminal. It also has been suggested that this is, or may be, the consequence of Article II, 1(d) of Control Council Act No. 10, which defines as criminal, "membership in categories of a criminal group or organization declared criminal by the International Military Tribunal." A purpose to inflict punishment without a right of hearing cannot be spelled out of the Charter, and would be offensive to both its letter and its spirit. And I do not find in Control Council Act No. 10 any inconsistency with the Charter. Of course, to reach all individual members would require numerous hearings. But they will involve only narrow issues; many persons will have no answers to charges if they are carefully prepared, and the proceedings should be expeditious, non-technical, held in the locality where the person accused resides, and, incidentally, may be conducted in two languages at most.

But I think it is clear that before any person is punishable for membership in a criminal organization, he is entitled to a hearing on the facts of his case. The Charter does not authorize the national authorities to punish membership without hearing -- it gives them only the right to "bring individuals to trial." That means what it says. A trial means there is something to try.

The Charter denies only one of the possible defenses of an accused; he may not relitigate the question in a subsequent trial whether the organization itself was a criminal one. Nothing precludes him from denying that his participation was voluntary and proving he acted under duress; he may prove that he was deceived or tricked into membership; he may show that he had withdrawn or he may prove that his name on the rolls is a case of mistaken identity.

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The membership which the Charter and the Control Council Act make criminal, of course, implies a genuine membership involving the volition of the member. The act of affiliation with the organization must have been intentional and voluntary. Legal compulsion or illegal duress, actual fraud or trick of which one is a victim has never been thought to be the victim's crime and such an unjust result is not to be implied now. The extent of the member's knowledge of the criminal character of the organization is, however, another matter. He may not have known on the day he joined but may have remained a member after learning the fact. And he is chargeable not only with what he knew but with all of which he reasonably was put on notice.

There are safeguards to assure that this program will be carried out in good faith. Prosecution under this declaration is discretionary and if there were purpose on the part of the Allied Powers to punish without trial, it would have been already done before this Tribunal was set up, and without waiting for its declaration. We think the Tribunal will presume that signatory powers which have voluntarily submitted to this process will carry it out faithfully.

The Control Council Act applies only to categories of membership declared criminal. This language on the part of the Control Council recognizes a power in this Tribunal to limit the effect of its declaration. I do not think, forreasons which I will later state, that this should be construed or availed of to try here any issues as to sub-groups or sections or individuals which can be tried in later proceedings. It should, I think, be construed to mean, not the sort of limitation which must be defined by evidence of details, but limitations of principle such as those I have already outlined, such as duress, involuntary membership, or matters of that kind, which the Tribunal can recognize and deal with without taking detailed evidence. It does not require this Tribunal to delve into evidence to condition its judgment, to apply only to intentional, voluntary membership. This does not supplant later trials but the declaration of this Tribunal guides them.

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It certainly cannot be said that a plan such as we have here for severance of the general issues common to many cases, from the particular issues applicable only to individual defendants for litigation in separate Tribunals specially adapted to the different kinds of issues, is lacking in reasonableness or fair play. And while it presents unusual procedural difficulties, I do not think it presents any insurmountable ones. I will discuss the question of the criteria and the principles and the precedents for declaring collective criminality before coming to the procedural questions involved.

The substantive law which governs the inquiry into criminality of organizations is, in its large outline, old and well settled and fairly uniform in all systems of law. It is true that we are dealing here with a procedure which would be easy to abuse and one often feared as an interference with liberty of assembly or as an imposition of guilt by association. It also is true that proceedings against organizations are closely akin to the conspiracy charge which is the great dragnet of the law, rightly watched by courts lest it be abused.

The fact is, however, that every form of government has considered it necessary to treat some organizations as criminal. Not even the most tolerant of governments can permit an accumulation of private power in organizations to a point where it rivals, obstructs or dominates the government itself. T do so would be to grant designing men a liberty to destroy liberty. The very complacency and tolerance as well as the impotence of the Weimar Republic towards the growing organization of Nazi power spelled the death of German freedom.

Protection of the citizen's liberty has required even free governments to enact laws making criminal those aggregations of power which threaten to impose their will on unwilling citizens. Every one of the nations signatory to this Charter has laws making certain types of organizations criminal. The Klu Klux Klan in the United States flourished at about the same time as the Nazi movement in Germany. It appealed to the same hates, practiced the same extra-legal coercions, and likewise terrorized by the same sort of weird nighttime ceremonials. Like the Nazi Party it was composed of a core of

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fanatics, but it enlisted the support of respectabilities who knew it was wrong, but thought it was winning. It eventually provoked a variety of legislative acts directed against such organizations, as organizations.

The Congress of the United States also has enacted legislation outlawing certain organizations. A recent example was the Act of 28 June 1940, in which the Congress provided that it shall be unlawful for any person, among other things, to organize or help to organize any society, group, or assembly of persons to teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence, or to be or become a member of, or affiliate with, any such society, group or assembly of persons, knowing the purposes thereof.

There is much legislation by states of the American Union creating analogous offenses. An example is to be found in the act of California dealing with criminal syndicalism, which, after defining it, makes criminal any person who organizes, assists in organizing, or is or knowingly becomes a member of such organization.

Precedents in English law for outlawing organizations and punishing membership therein are old and consistent with the Charter.

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One of the first is the British India Act No. 30, enacted in 1836, which, among other things, provides:

"It is hereby enacted that whoever shall be proved to have belonged either before or after the passing of this Act to any gang of thugs either within or without the territories of the East India Company shall be punished with imprisonment for life with hard labor."

And the history is that this was a successful act in suppressing violence.

Other precedents in English legislation are the Unlawful Societies Act of 1799, the Seditious Meetings Act of 1817, the Seditious Meetings Act of 1846, the Public Order Act of 1936, and Defense Regulations 18 (b). The latter, not without opposition, was intended to protect the integrity of the British Government against fifth-column activities of this same Nazi conspiracy.

Soviet Russia punishes as a crime the formation of and membership in a criminal gang. Criminologists of the Soviet Union call this crime the "crime of banditry", a term altogether appropriate to these German organizations. General Rudenko will advise this Tribunal more in detail as to the Soviet Law.

French criminal law makes membership in subversive organizations a crime. Membership of the criminal gang is a crime in itself. My distinguished French colleague will present you more detail on that.

Of course, I would not contend that the law of a single country, even one of the signatory powers, was governing here, but it is clear that this is not an act or a concept of a single system of law, that all systems of law agree that there are points at which organizations become intolerable in a free society.

For German precedents, it is neither seemly nor necessary to go to the Nazi regime, which, of course, suppressed all their adversaries ruthlessly. However, under the Empire and the Weimar Republic, German jurisprudence deserved respect, and it presents both statutory and juridical examples of declaring organizations to be criminal. Statutory examples are:

The German Criminal Code enacted in 1871. Section 128 was aimed against secret associations, and 129 was directed against organizations inimical to the State.

A law of March 22, 1921, against paramilitary organizations.

A law of July 21, 1922, against organizations aimed at overthrowing the constitution of the Reich.

Section 128 of the Criminal Code of 1871 is especially pertinent. It reads:

"The participation in an organization, the existence, constitution, or purposes of which are to be kept secret from the Government, or in which obedience to unknown superiors or unconditional obedience to known superiors is pledged, is punishable by imprisonment."

It would be difficult to draw an act that would more definitely condemn the organizations with which we are dealing here than this German Criminal Code of 1871.

I recall to your attention that it condemns organizations in which obedience to unknown superiors or unconditional obedience to known superiors is pledged. It is exactly the sort of danger and menace with which we are dealing.

Under the Empire, various Polish national unions were the subject of criminal prosecution. Under the Republic, in 1927 and 1928, judgments held criminal the entire Communist Party of Germany. In 1922 and 1928, judgments of the courts ran against the political Leadership Corps of the Communist Party, which included all of its so-called body of functionaries. This body of functionaries in that organization corresponded somewhat in their powers to the Leadership Corps of the Nazi Party which we have accused here. The judgment against the Communist Party rendered by the German Courts included every cashier, every employee, every delivery boy and messenger, and every district leader. In 1930 a judgment of criminality against what was called "The Union of Red Front Fighters" of the Communist Party made no distinction between leaders and ordinary members.

Most significant of all is the fact that on the 30th of May, 1924, judgment of the German Courts was rendered that the whole Nazi Party was a criminal organization. Evidently there was a lack of courage to enforce that judgment, or we might not have been here. This decision referred not only to the Leadership Corps, which we are indicting here, but to all other members as well. The whole rise of the Nazi Party to power was in the shadow of this judgment of illegality by the German courts themselves.

The German courts, in dealing with criminal organizations, proceeded on the theory that all members were held together by a common plan in which each one participated even though at various levels. Moreover, fundamental principles of responsibility of members as stated by the German Supreme Court



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are strikingly like the principles that govern our Anglo-American law of conspiracy. Among the statements by the German courts are these:

"It is a matter of indifference whether all the members pursued the forbidden aims. It is enough if a part exercised the forbidden activity."

And again: "It is a matter of indifference whether the members of the group or association agree with the aims, tasks, means of working and means of fighting."

And again: "The real attitude of mind of the participants is a matter of indifference. Even if they had the intention of not participating in criminal efforts, or hindering them, this cannot eliminate their responsibility from real membership."

Organizations with criminal ends are everywhere regarded as in the nature of criminal conspiracies, and their criminality is judged by application of conspiracy principles. The reason why they are offensive to law-governed people has been succinctly stated by an American legal authority as follows, and I quote from Miller on Criminal Law:

"The reason for finding criminal liability in case of a combination to effect an unlawful end or to use unlawful means, where none would exist, even though the act contemplated were actually committed by an individual, is that a combination of persons to commit a wrong, either as an end or as a means to an end, is so much more dangerous, because of its increased power to do wrong, because it is more difficult to guard against and prevent the evil designs of a group of persons than of a single person, and because of the terror which fear of such a combination tends to create in the minds of people."

The Charter, in Article 6, provides that "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

That, of course, is a statement of the ordinary

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law of conspiracy.

The individual defendants are arraigned at your bar on this charge of conspiracy which, if proved, makes them responsible for the acts of others in execution of the common plan.

The Charter did not define responsibility for the acts of others in terms of "conspiracy" alone. The crimes were defined in non-technical but inclusive terms, and embraced formulating and executing a common plan, as well as participating in a conspiracy. It was feared that to do otherwise might import into the proceedings technical requirements and limitations which have grown up around the term "conspiracy". There are some divergences between the Anglo-American concept of a conspiracy and that of either French, Soviet, or German jurisprudence. It was desired that concrete cases be guided by the broader considerations inherent in the nature of the problem I have outlined, rather than to be controlled by refinements of any local law.

Now, except for procedural difficulties arising from their multitude, there is no reason why every member of any Nazi organization accused here could not have been indicted and convicted as a part of the conspiracy under Article 6, even if the Charter hadnever mentioned organizations at all. To become voluntarily affiliated was an act of adherence to some common plan or purpose.

These organizations did not pretend to be merely social or cultural groups; admittedly, their members were united for action. In the case of several of the Nazi organizations, the fact of confederation was evidenced by formal induction into membership, the taking of an oath, the wearing of a distinctive uniform, the submission to a discipline. That all members of each Nazi organization did combine under a common plan to achieve some end by combined efforts is abundantly established.

The criteria for determining whether these ends were guilty ends are obviously those which would test the legality of any combination or conspiracy. Did it contemplate illegal methods or purpose illegal ends? If so, the liability of each member of one of these Nazi organizations for the acts of every other member is not essentially different from the liability for conspiracy enforced in the courts of the United States against business men who combine in violation of the anti-trust laws, or of other defendants

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accused under narcotic drugs laws, sedition acts, or other Federal penal enactments.

Among the principles every day enfonced in courts of Great Britain and the United States in dealing with conspiracy are these sweeping principles:

No formal meeting or agreement is necessary. It is sufficient, although one performs one part and other persons other parts, if there be concert of action and working together understandingly with a common design to accomplish a common purpose.

Secondly, one may be liable even though he may not have known who his fellow conspirators were or just what part they were to take or what acts they committed, and though he did not take personal part in them or was absent when criminal acts occurred.

Third, there may be liability for acts of fellow conspirators although the particular acts were not intended or anticipated if they were done in execution of the common plan. One in effect makes a fellow-conspirator his agent with blanket authority to accomplish the ends of the conspiracy.

Fourth, it is not necessary to liability that one be a member of a conspiracy at the same time as other actors, or at the time of criminal acts. When one becomes a party to a conspiracy, he adopts and ratifies what has gone before and remains responsible until he abandons the conspiracy with notice to his fellow conspirators.

Now, those are sweeping principles, but no society has been able to do without those defenses against the accumulation of power through aggregations of individuals.

Members of criminal organizations or conspiracies who personally commit crimes, of course, are individually punishable for those crimes exactly as are those who commit the same offenses without organizational backing. The very essence of the crime of conspiracy or membership in a criminal association is liability for acts one did not personally commit, but which his acts facilitated or abetted. The crime is to combine with others and to participate in the unlawful common effrrt, however innocent the personal acts of the participants when considered by themselves.

The very innocent act of mailing a letter is enough to tie one into a

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conspiracy if the purpose of the letter is to advance a criminal plan. And we have multitudinous examples in the jurisprudence of the United States where the mailing of a letter brought one not only within the orbit of the definition of crime, but within Federal jurisdiction.

There are countless examples of this doctrine that innocent acts in the performance of a common purpose render one liable for the criminal acts of others performed to that same end.

The sweep of the law of conspiracy is an important consideration in determining the criteria of guilt for organizations. Certainly the vicarious liability imposed in consequence of voluntary membership, formalized by oath, dedicated to a common organizational purpose and submission to a discipline and chain of command, cannot be less than that vicarious liability which follows from inforal cooperation with a nebulous group, as is sufficient in the case of conspiracy.

This meets the suggestion that the prosecution is required to prove every member, or every part, fraction, or division of the membership to be guilty of criminal acts. That suggestion ignores the conspiratorial nature of the charge against organizations. Such an interpretation also would reduce the Charter to an unworkable absurdity. To concentrate in one International Tribunal inquiries requiring such detailed evidence as to each member or as to each subsection would set a task not possible of completion within the lives of living men.

It is easy to toss about such a plausible but superficial cliche as that "one should be convicted for his activities and not for his membership." But this ignores the fact that membership in Nazi bodies was an activity. It was not something passed out to a passive citizen like a handbill. Even a nominal membership may aid and abet a movement greatly.

Does anyone believe that the picture of Hjalmar Schacht sitting in the front row of the Nazi Party Congress, which you have seen, wearing the insignia of the Party, was included in the propaganda films of the Nazi Party merely for artistic effect? This great bankers mere loan of his name to this shady enterprise gave it a life and a respectability in the eyes of every hesitating

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German. There may be instances in which membership did not aid and abet the organizational ends and means, but individual situations of that kind are for appraisal in the later hearings and not by this Tribunal.

By and large, the use of organizational affiliation is a quick and simple, but at the same time fairly accurate outline of the contours of a conspiracy to do what the organization actually did. It is the only workable one at this stage of the trial. It can work no injustice because before any individual can be punished, he can submit the facts of his own case to further and more detailed judicial scrutiny.

While the Charter does not so provide, we think that on ordinary legal principles the burden of proof to justify a declaration of criminality is upon the prosecution. It is discharged, we think, when we establish the following.

1. The organization or group in question must be some aggregation of persons associated in identifiable relationship with a collective, general purpose.

2. While the Charter does not so declare, we think it implied that membership in such an organization must be generally voluntary. This does not require proof that every member was a volunteer. Nor does it mean that an organization is not to be considered voluntary if the defense proves that some minor fraction or small percentage of its membership was compelled to join. The test is a common-sense one: Was the organization on the whole one which persons were free to join or to stay out of? Membership is not made involuntary by the fact that it was good business or good politics to identify one's self with the movement. Any compulsion must be of the kind which the law normally recognizes and threats of political or economic retaliation would be of no consequence.

3. The aims of the organization must be criminal in that it was designed to perform acts denounced as crimes in Article 6 of the Charter. No other act would authorize conviction of an individual and no other act would authori. conviction of the organization in connection with the conviction of the individual.

4. The criminal aims or methods of the organization must have been of such character that its membership in general may properly be charged with

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knowledge of them. This again is not specifically required by the Charter. Of course, it is not incumbent on the prosecution to establish the individual knowledge of every member of the organization or to rebut the possibility that some may have joined in ignorance of its true character.

5. Some individual defendant must have been a member of the organization and must be convicted of some act on the basis of which the organization was declared to be criminal.

I shall now take up the subject of the issues, as we see them, which are for trial before this Tribunal, and some discussion of those which seem to us not to be for trial before this Tribunal.

Progress of this trial will be expedited by a clear definition of the issues to be tried. I have indicated what we consider to be proper criteria of guilt. There are also subjects which we think are not relevant before this Tribunal, some of which are mentioned in the specific questions asked by the Tribunal.

Only a single ultimate issue is before this Tribunal for decision. That is whether accused organizations properly may be characterized as criminal ones or as innocent ones. Nothing is relevant here that does not bear on a question that would be common to the case of every member. Any matter that would be exculpating for some members but not for all is, as we see it, irrelevant here.

We think it is not relevant to this proceeding at this stage that one or many members were conscripted if, in general, the membership was voluntary. It may be conceded that conscription is a good defense for an idividual charged with membership in a criminal organization, but an organization can have criminal purposes and commit criminal acts even if a portion of its membership consists of persons who were compelled to join it. The issue of conscription is not pertinent to this proceeding, but it is pertinent to the trials of individuals for membership in organizations declared to be criminal.

Also, we think it is not relevant to this proceeding that one or more members of the named organizations were ignorant of its criminal purposes or methods if its purposes or methods were open and notorious. An organization may have criminal purposes and commit criminal acts although one or many of its members were without personal knowledge thereof. It a person joined what he

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thought was a social club, but what in fact turned out to be a gang of cut-throats and murderers, his lack of knowledge would not exonerate the gang considered as a group, although it might possibly be a factor in extenuation of a charge of criminality brought against him for mere membership in the organization. Even then, the test would be not what the man actually knew, but what, as a person of common understanding, he should have known.

It is not relevant to this proceeding that one or more members of the named organizations were themselves innocent of unlawful acts. This proposition is basic to the entire theory of the declaration of organizational criminality. The purpose of declaring criminality of organizations, as in every conspiracy charge, is

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punishment for aiding crimes, although the precise perpetrators can never be found or identified.

We know that the Gestapo and SS, as Organizations, were given principal responsibility for the extermination of the Jewish people in Europe, but beyond a few isolated instances, we can never establish which members of the Gestapo or SS actually carried out the murders. Most of them were concealed by the anonymity of the uniform, committed their crimes and passed on. Witnesses know that it was an SS man or a Gestapo man, but to identify him is impossible. Any member guilty of direct participation in such crimes, if we can find and identify him, can be tried on the charge of having committed the specific crimes, in addition to the general charge of membership in a Criminal Organization.

Therefore, it is wholly immaterial that one or more members of the Organizations were themselves allegedly innocent of specific wrongdoing. The purpose of this proceeding is not to reach instances of individual criminal conduct, even in subsequent trials, and therefore such considerations are irrelevant here.

Another question raised by the Tribunal is the period of time during which the Groups or Organizations named in the Indictment are claimed by the Prosecution to have been criminal. The Prosecution believes that each Organization should be declared criminal for the period stated in the Indictment. We do not contend that the Tribunal is without power to condition its declaration so as to cover a lesser period of time than that set forth in the Indictment. The Indictment is specific as to each Organization. We think that the record at this time affords adequate evidence to support the charge of criminality with respect to each of the Organizations during the full time set forth in the Indictment.

Another question raised by the Tribunal is whether any classes of persons included within the accused Groups or Organizations should be excluded from the declaration of criminality. It is, of course, necessary that the Tribunal relate its declaration to some identifiable

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Group or Organization. The Tribunal, however, is not expected or required to be bound by formalities of organization. In framing the Charter, the use was deliberately avoided of terms or concepts which would involve this trial in legal technicalities about juristic persons or entities.

Systems of jurisprudence are not uniform in the refinements of these fictions. The concept of the Charter, therefore, is a non-technical one. "Group," or "Organization," should be given no artificial or sophistical meaning. The word, "Group" was used in the Charter as a broader term, implying a looser and less formal structure or relationship than is implied in the term, "Organization." The terms mean in the context of the Charter what they mean in the ordinary speech of the people. The test to identify a Group or Organization is, we submit, a natural and commonsense one.

It is important to bear in mind that, while the Tribunal no doubt has power to make its own definition of the Groups it will declare criminal, the precise composition and membership of Groups and Organizations is not an issue for trial here. There is no Charter requirement and no practical need for the Tribunal to define a Group or Organization with such particularity that its precise composition or membership is thereby determined.

The creation of a mechanism for later trial of such issues was a recognition that the declaration of this Tribunal is not decisive of such questions and is likely to be so general as to comprehend persons who on more detailed inquiry will prove to be outside of it.

Any effort by this Tribunal to try questions of exculpation of individuals, be they few or many, would unduly protract the trial, transgress the limitation of the Charter, and quite likely do some mischief by attempting to adjudicate precise boundaries on evidence which is not directed to that purpose.

THE PRESIDENT: Would this be a convenient time for you to break off?

MR. JUSTICE JACKSON: Yes, sir.

(A recess was taken.)

The Prosecution stands upon the language of the Indictment and contends that each group or organization should be declared criminal as an entity and that no inquiry should be entered upon and no evidence entertained as to the exculpation of any class or classes of persons within such descriptions. Practical reasons of conserving the Tribunal's time combine with practical considerations for defendants. A single trial held in one city to deal with questions of excluding thousands of defendants living all over Germany could not be expected to do justice to each member unless it was expected to endure indefinitely. Provision for later, local trials of individual relationships protects the rights of members better than possibly can be done in proceedings before this Tribunal.

With respect to the Gestapo, the United States and I believe all my colleagues, consents to exclude persons employed in purely clerical, stenographic, janitorial or similar unofficial routine tasks. As to the Nazi Leadership Corps we abide by the position taken at the time of submission of the evidence, that the following should be included: the Fuehrer, the Reichsleitung (i.e., the Reichsleiters, main departments and office holders), the Gauleiters and their staff officers, the Kreisleiters and their staff officers, the Ortsgruppenleiters, the Zellenleiters and the Blockleiters, but not members of the staff of the last three officials.

As regards the SA, it is considered advisable that the Declaration expressly exclude (1) wearers of the SA Sports Badge; (2) SA controlled Home Guard Units, which were not, as we view it on the evidence, strictly part of the SA; and there also be excluded the National Socialist League for Disabled Veterans and the SA Reserve, so as to include only the active parts of that organization.

The Prosecution does not feel that there is evidence of the severalability of any class or classes of persons within the organizations accused which would justify any further concessions and that no other part of the named groups should be excluded. In this connection, we would again stress the principles of conspiracy. The fact that a section of an organization itself committed no criminal act, or may have been occupied in technical or administrative functions, does not relieve that section of criminal responsibility if its activities contributed to the over-all accomplishment of the criminal enterprise.



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I should like to discuss the question of the further steps to be taken procedurally before this Tribunal.

Over 45,000 persons have joined in communications to this Tribunal asking to be heard in connection with the accusations against organizations. The volume of these applications has caused apprehension as to further proceedings. No doubt there are difficulties yet to be overcome, but my study indicates that the difficulties are greatly exaggerated.

The Tribunal is vested with wide discretion as to whether it will entertain an application to be heard. The Prosecution would be anxious, of course, to have every application granted that is necessary, not only to do justice, but to avoid appearance off doing anything less than justice. And we do not consider that expediting this trial is so important as affording a fair opportunity to present all really pertinent facts.

Analysis of the conditions which have brought about this flood of applications indicates that their significance is not proportionate to their numbers. The Tribunal sent out 200,000 printed notices of the right to appear before it and defend. They were sent to allied prisoner of war and internment camps. The notice was published in all German language papers and was repeatedly broadcast over the radio. Investigation shows that the notice was posted in all barracks of the camps and it also shows that in many camps it was read to the prisoners, in addition. The 45,000 persons who responded with applications to be heard came principally from about fifteen prisoner of war and internment camps in British or United States control. Those received included an approximate 12,000 from Dachau, 10,000 from Langwasser, 7,500 from Auerbach, 4,000 from Staumuehle, 2,500 from Garmish and several hundred from each of the others.

We have had some investigation of these applications, as well as of the sending out of the notices and we would be glad to place any information we have at the disposal of the Tribunal.

An investigation was made of the Auerbach camp in the United States zone, principally to determine the reason for these applications and the method by which they came. That investigation was conducted by Lt. Colonel Smith Brookhart, Captain Drexel Sprecher and Captain Krieger, all of whom are known to this Tribunal.

The Auerbach camp is for prisoners of war, predominantly SS members. Its

prisoners number 16,964 enlisted men and 923 officers. The Notice of the International Tribunal was posted in each of the barracks and was read to all inmates. All applications to the Tribunal were forwarded without censorship. Applications to defend were made by 7,509 SS members.

Investigation indicates that these were filed in direct response to the notice and that no action was directed or inspired from any other source within or without the camp. All who were interrogated professed that they had no knowledge of any SS crimes or of SS criminal purpose, but they expressed interest only in their individual fate, rather than any concern to defend the organization.

Our investigators report no indication that they had any additional evidence or information to submit on the general question of the criminality of the SS as an organization. They seemed to think it was necessary to protect themselves to make the application here.

Turning then from examination of the applications, these on their face, indicate that most of the members do not profess to have evidence on the general issue triable here. They assert that the writer has neither committed nor witnessed nor known of the crimes charged against the organization. On a proper definition of the issues such an application is insufficient on its face, to warrant a personal intervention.

A careful examination of the notice to which these applications respond will indicate, I believe, that the notice contains no word which would inform a member, particularly if he were a layman, of the narrowness of the issues which are to be considered here, or that he will have later opportunity, if and when prosecuted, to present personal defenses. On the other hand the notice, it seems to me, creates the impression, particularly on a layman, that every member may be convicted and punished by this Tribunal and that his only chance to be heard is here. I think a careful examination of these notices will bear out that impression and a careful examination of the applications will show that they are in response to that impression.

Now, among lawyers there is usually a difference of opinion as to how best to proceed and this case presents no exception to that; there are different ideas. But I shall advance certain views as to how we should proceed from here to obtain a fair and proper adjudication of these questions.



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In view of these facts we suggest a consideration of the following program for completion of this trial as to organizations.

1. That the Tribunal formulate and express in an order the scope of the issues and the limitations on the issues to be heard by it.

2. That a notice adequately informing members as to the limitation on issues and the opportunity later to be individually tried be sent to all applicants and published as was the original notice.

3. That a panel of masters be appointed, as authorized in Article 17 (e) of the Charter, to examine applications and to report those that are insufficient on their own statements, and to go to the camps and supervise the taking of relevant evidence. Defense counsel and prosecution representatives should, of course, attend and be heard before the masters. The masters should reduce any evidence to deposition form and report the whole to this Tribunal to be introduced as a part of its record.

4. The representative principle may also be employed to simplify this task. Members of particular organizations in particular camps might well be invited to choose one or more to represent them in presenting evidence.

It may not be untimely to remind the Tribunal and Defense Counsel that the prosecution has omitted from evidence many relevant documents which show repetition of crimes by these organizations in order to save time by avoiding cumulative evidence. It is not too much to expect that cumulative evidence of a negative character will likewise be limited.

Some concern has been expressed as to the number of persons who might be affected by the declarations of criminality which we have asked. Some people seem more susceptible to the shock of a million punishments than to the shock of five-million murders. At most the number of punishments will never catch up with the number of crimes. However, it is impossible to state, even with approximate accuracy, the number of persons who might be affected by the Declaration of Criminality which we have asked.

Figures from the German sources seriously exaggerate the number, because they do not take account of heavy casualties in the latter part of

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the war, and make no allowance for duplication of membership which was large. For example, the evidence is to the effect that 75% of the Gestapo men also were members of the SS. We know that the United States forces have a roughly estimated 130,000 detained persons who appear to be members of accused organizations. I have no figure from other Allied forces. But how many of these actually would be prosecuted, instead of being dealt with under the de-Nazification program, no one can foretell. Whatever the number, of one thing we may be sure -- it is so large that a thorough inquiry by this Tribunal, into each case, would prolong its session beyond endurance. All questions as to whether individuals or sub-groups of accused organizations should be excepted from the Declaration of Criminality should be left for local courts, located near the home of the accused and near sources of evidence. These courts can work in one or at most in two languages, instead of four, and can hear evidence which both parties direct to the specific case.

This is not the time to review the evidence against particular organizations which, we take it, should be reserved for summation after all of the evidence is presented. But is is timely to say that the selection of the six organizations named in the Indictment was not a matter of chance. The chief reasons they were chosen are these: collectively they were the ultimate repositories of all power in the Nazi regime; they were not only the most powerful, but the most vicious organizations in the regime; and they were organizations in which membership was generally voluntary.

The Nazi Leadership Corps consisted of the directors and principle executors of the Nazi Party, and the Nazi Party was the force lying behind and dominating the whole German state. The Reichs Cabinet was the facade through which the Nazi Party translated its will into legislative, administrative, and executive acts. The two pillars on which the security of the regime rested were the Armed Forces, directed and controlled by the General Staff and High Command, and the police forces -- the Gestapo, the SA, the SD, and the SS. These organizations exemplify all the evil forces of the Nazi regime.

These organizations were also selected because, while representative, they were not so large or extensive as to make it probable that innocent, passive, or indifferent Germans might be caught up in the same net with

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the guilty. State officialdom is represented, but not all administrative officials or departments heads or civil servants; only the Reichs Cabinet, the very heart of Nazidom within the Government, is named. The Armed Forces are accused, but not the average soldier or officer, no matter how high-ranking. Only the top policy makers -- the General Staff and tthe High Command -- are named. The police forces are accused -- but not every policeman, not the ordinary police which performed only normal police functions. Only the most terroristic and repressive police elements the Gestapo and SD -- are named. The Nazi Party is accused -- but not every Nazi voter, not even every member, only the leaders. And not even every Party official or worker is included; only "the bearers of soverignty", in the metaphysical jargon of the Party, who were the actual commanding officers and their staff officers on the highest levels.

I think it is important that we observe, in reference to the Nazi Party, just what it isthat we are doing here and compare it with the de-Nazification program in effect without any Declaration of Criminality, in order to see in its true perspective the Indictment which we bring against the Nazi Party.

Some charts have been prepared. This is a mere graphic representation of the proportions of persons that we have accused and which we ask this Tribunal to declare as constituting criminal organizations.

In the first column are the 79 million German citizens. We make no accusation against the citizenry of Germany. The next is the 48 million voters, who at one time voted to keep the Nazi Party in power. They voted in response to the referendum. We make no charge against those who supported the Nazi Party, although in some aspects of the de-Nazification program the supporters are included. Then comes the five million Nazi members, persons who definitely joined the Nazi Party by an act of affiliation, by an oath of fidelity. But we do not attempt to reach that entire five

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million persons, although I have no hesitation in saying that there would be good ground for doing so, but as a mere matter of practicality of this situation, it is not possible to reach all of those who are technically and perhaps morally well within the confines of this conspiracy. So the voters are disregarded, the 48 million; the five million members are disregarded and the first that we propose to reach are the Nazi leaders, starting with the Blockleiters, which are shown in the last small block, and piled together, amounting to the fourth block on the diagram.

It is true that we start with the local Blockleiter but he had responsibilities; responsibilities for herding in to the fold his fifty households; responsibilities for spying upon them and reporting their activities; responsibilities, as this evidence shows, for disciplining them and for leading them. No political movement can function in the drawing rooms and offices. It has to reach the masses of the people and these Blockleiters were the essential elements in making this program effective among the masses of the people and in terrorizing them into submission.

I submit that on this diagram, the accusation which we bring here is a moderate one, reaching only persons of admitted leadership responsibilities and not trying to reach people who may have been beguiled into following in an unorganized fashion.

We have also accused the formations, Party formations, such as the SA and the SS. These were the strong arms of the Party. These were the organizations that the Blockleiter was authorized to call in to help him if he needed to discipline somebody in his block of fifty houses.

But we do not accuse every one of the formations of the Party, nor do we accuse any of the twenty or more supervised or affiliated Party groups, Nazi organizations in which membership was compulsory, either legally or in practice, such as the Hitler Youth and the Student League. We do not accuse the Nazi professional organizations, although they were Nazi dominated, like the Civil Servants Organization, the Teachers Organization, the National Socialist Lawyers Organization, although I should show them as little charity as any group. We do not accuse any Nazi organizations which have some

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legitimate purpose, like welfare organizations. Only two of these Party formations are named, the SA and the SS, the oldest of the Nazi organizations, groups which had no purpose other than carrying out the Nazi schemes and which actively participated in every crime denounced in the Charter, and furnished the manpower for most of the crimes which we have proved.

In administering preventive justice with a view to forestalling repitition of these crimes against peace, crimes against humanity and war crimes, it would be a greater catastrophe to acquit these organizations than it would be to acquit the entire twenty-two individual defendants in the box. These defendants' power for harm is spent. That of these organizations goes on. If these organizations are exonerated here the German people will infer that they did no wrong and they will easily be regimented in reconstituted organizations under new names behind the same program.

In administering retributive justice it would be possible to exonerate these organizations only by concluding that no crimes have been committed by the Nazi regime. For these organizations' sponsorship of every Nazi purpose and their confederation to execute every measure to attain these ends is beyond denial. A failure to condemn these organizations under the terms of the Charter can only mean that such Nazi ends and means cannot be considered criminal and that the Charter of the Tribunal declaring them so is a nullity.

I think my colleagues, who have somewhat different aspects of the case to deal with, would like to be heard on this subject.

THE PRESIDENT: Mr. Justice Jackson and Sir David Maxwell-Fyfe, the Tribunal thinks the most convenient course would be to hear argument on behalf of all the chief prosecutors and then to hear argument on behalf of such defendants' counsel as wish to be heard and after that the Tribunal will probably wish to ask some questions of the chief prosecutors.

MR. JUSTICE JACKSON: That will be very agreeable to us.

SIR DAVID MAXWELL-FYFE: May it please the Tribunal: Mr. Justice Jackson has dealt with the general principles under which the organizations named in the Charter should, in the view of the Prosecution, be dealt with. It is not my purpose to repeat or to underline his arguments. My endeavor is to comply with Paragraph 4 of the statement of the Tribunal made on the 14 of

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January of this year. This involves:

(a) Summarizing in respect of each named organization, the elements which in our opinion justify the charge of their being criminal organizations. For convenience I shall refer to these as the elements of criminality.

(b) Indicating what acts on the part of individual defendants in the sense used in Article 9 of the Charter justified declaring the groups or organizations of which they are members to be criminal organizations. Again for convenience, I shall refer to such defendants in the wording of the Charter, as connected defendants.

(c) I shall submit that what I have put forward in writing under (a) and (b) will form the necessary summary of proposed findings of fact under the Tribunal's third point.

May I say one word about the mechanics of the position? I thought that it would be convenient if the Tribunal and the Defense Counsel had copies of these suggestions before I address the Tribunal. In pursuance of this, copies have been given to the members of the Tribunal, of course to the court interpreters, and copies in German have been provided for counsel for the organizations and also for counsel for each of the individual defendants.

For the convenience of the Tribunal and of counsel, I have circulated two addenda, which contain further references to the transcript and documents on a number of points in the original appendices. These addenda are compiled under the numbers of paragraphs and although they are in English, should be readily usable by Counsel for the Defense. The result is that there is the summary in appendices (a) and (b) which I put in and full reference on all the points in the summary to the transcript and in some cases to documents.

It is my intention not to read in full all the matters contained in my appendix (a) and appendix (b) but to indicate how they fit in with the conception of the Prosecution on this aspect of the case. I shall, of course, be only too ready to read any portions which may be convenient to the Tribunal.

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I think it would be best to start from the essential probanda which Mr. Justice Jackson has indicated, and perhaps the Tribunal will bear with me while I repeat his five points.

1. The organization of the group in question must be some aggregation of persons (a) in some identifiable relationship (b) with a collective gerenal purpose. That was Mr. Justice Jackson's first test.

2. Membership in such organization must be generally voluntary, although a minor proportion of involuntary members will not affect the position.

3. The aims of the organizations must be criminal in the sense that its objects included the performance of acts denounced as crimes by Article VI of the Charter.

4. The criminal aims or methods of the organization must have been of such a character that a reasonable man would have constructive knowledge of the organization which he was joining; that is, that he ought to have known what type of organization he was joining.

5. Some individual defendants, at least one, must have been a member of the organization and must be convicted of some act on the basis of which a declaration of the criminality of the organization can be made.

I do not think that I can avoid applying these tests to each of the organizations, but I conceive that this can be done with brevity, and I therefore propose to deatl with the organizations seriatim.

I take first the Reichsregierung. Under appendix B of the Indictment this group is defined as consisting of three classes:

1. Members of the ordinary cabinet after the 30th of January 1933. The term "ordinary cabinet" is in turn used as meaning--

(a) Reich ministers, that is, heads of departments;

(b) Reich ministers without portfolio;

(c) State ministers acting as Reich ministers:

(d) Other officials entitled to take part in meetings of the cabinet.

The second division is members of the Council of Ministers for the Defens of the Reich.

The third division is members of the Secret Cabinet Council.

It is submitted that on the evidence placed before the Tribunal there is

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no doubt that the first of Mr. Justice Jackson's points, point one, is complied with in that there is an identifiable relationship with a collective general purpose, and that this organization is generally voluntary within point two.

The aims of the organization are set out in paragraph four of Section A of my Appendix A and the broad submission of the prosecution is shown in paragraph two, that is short. It I might be allowed to read it?--

"Owing to their legislative powers and functions the members of the Reichsregierung gave statutory effect to the policy of the Nazi conspirators and collectively formed a combination of persons carrying out the executive and administrative decisions of the Nazi conspiracy."

The prosecution apply that general submission to the crimes constituted by Article VI of the Charter in paragraphs five, six, seven, and eight of that appendix.

If the Tribunal would like me to deal further with these paragraphs I should be pleased to read and comment on any that it is desired.

When it is remembered that the Reichsregierung possess policy-making, legislative, administrative, and executive powers and functions, and that many of its members held at the same time important positions in the Party and in governmental activities outside the cabinet, enormous political power was concentrated in this group.

As I said, the Reichsregierung implemented and gave statutory effect to the program of the conspirators.

If the Tribunal will be good enough to turn to my appendix B they will see that seventeen of the twenty-one defendants before the Court were members of the Reichsregierung. The prosecution have submitted an enormous body of evidence against these seventeen defendants, and they now submit that it is sufficient to say that these seventeen defendants should be convicted under eac count of the Indictment, and therefore under each portion of Articla VI of the Charter; and that they form the connected defendants with the Reichsregierung, under Mr. Justice Jackson's point number five.

The acts which I have mentioned and which are set out in paragraph four of my Appendix A and the other paragraphs are of such a character that no one in a ministerial capacity could fail to have constructive knowledge of their nature

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and intent.

I now pass to the leadership corps of the Nazi Party. Mr. Justice Jackson has indicated that the conspirators required wide instruments of support. Hitler boasted of the complete domination of the Reich and of its institutions and of its organizations, internal and external, by the National Socialist Party.

In the Nazi Party, based on the Fuehrer principe, its policies and operation were determined not by the membership as a whole but by the corps of bearers of sovereignty and their staff. These leaders were all political deputies obliged to support and carry out the doctrines of the Party.

At every level regular and frequent conferences were held to discuss questions of policy and working measures. The leaders held the Party together, but they also kept the entire populace firmly in the grip of the conspirators through the control of the descending hierarchy of leaders.

The prosecution submit that all these leaders are within the organization which they claim to be criminal, and as Mr. Justice Jackson pointed out the staffs of the Reichsleiter, Gauleiter, and Kreisleiter, which are set out in the volumes of the National Socialist Organization Yearbook as being in these positions.

The Tribunal will note that we have omitted the staffs of the more junior Hoheitstraeger, as Mr. Justice Jackson has pointed out, and on that the prosecution again say that there is no doubt that points one and two of Mr. Justice Jackson's criteria are complied with, and they indicate in paragraphs one, two three, and four of Section B of my Appendix A the element of criminality; they indicate in my Appendix B the defendants who are involved; and in a later portion of Appendix B they submit that from the position of these defendants as members of the Leadership Corps and in the government and the Nazi Party, and further, from the close inter-connection between the government of the Reich and the Party it is clear that the Leadership Corps is a criminal organization connected with all the crimes charged against all the defendants in the Indictment, including those who were in the Leadership Corps and elaborated before the Tribunal in the individual presentations.

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The Nazi Party is the core of the conspiracy and criminality alleged, and the defendants are the core of the Nazi Party. Again the prosecution say that no one living in Germany and taking part in the management, which in this case means literally the ordering of the Nazi Part, could fail to have constructive knowledge of the intentions of its leaders and the methods of carrying these out. This inner circle is in a very different position from even the best-informed opinion outside Germany.

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I now pass to the SS, including the SD. The Prosecution respectfully reminds the Tribunal of the statements regarding the composition of the SS and its history, set out shortly in Appendix B of the Indictment, on page 36 of the English text. The Prosecution stands by these statements, which it submits are clear. I do not intend to read them at the present moment.

The Tribunal has heard in the case regarding the SS (the transcript pages 1786 to 1889 and the case regarding concentration camps pages 1399 to 1432), and also the evidence as to the defendant Kaltenbrunner, of which the reference is given in the addendum. They have also heard in the cases of the French and Soviet delegations additional mountains of evidence with regard to the SS. It is submitted that there is no difficulty on the first three of Mr. Justice Jackson's points, and that the criminality of the SS has been proved several times over.

On the fourth point I venture to submit the submission in paragraph 4 of Section C of my Appendix A, that the crimes of the SS were commited, first, on such a vast scale, and secondly, over such a vast area that the criminal aims and methods of the SS, which have staggered humanity since this trial opened, must have been known to its members. It was difficult to drive from one city of Germany to another without passing near to a concentration camp, and every concentration camp contained its SS crimes. In my Appendix B the Tribunal will find the members of the SS who are defendants set out, and in the second part, a summary of the crimes of the defendant Kaltenbrunner. The Prosecution gives to him a sinister particularity, while relying also on the crimes of the other defendants who were members.

DR. PANNENBECKER (counsel for defendant Frick): I should like to point out that the listing of Frick in this position is apparently fallacious since in the list of offices that Frick occupied this is not mentioned as one of them.

THE PRESIDENT: Do you mean not a member of the SS?

DR. PANNENBECKER: In this list it says that Frick was a member of the SS. That is not so. And in the affidavit that he himself delivered he denies that fact.

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DR. SEIDL (counsel for defendant Frank): Speaking for Frank: In the statements just made by the Prosecutor the defendant Frank is listed as a member of the SS. Already earlier in the trial the American Prosecutor submitted Document 2979 PS, U.S.... Exhibit No. 7. This document shows that Frank was at no time a member of the SS or, as it is asserted in the Indictment, was an SS General.

I should like to point out to the Tribunal further that several months ago, at the time when the Indictment was being read against the SSecriminal organization, the name of the defendant Doctor Frank was not mentioned. I can consequently assume that in this case a mistake has been made in the drawing up of this list.

DR. THOMA (counsel for defendant Rosenberg): I should like to make the same statement made by my colleague Doctor Seidl in reference to Rosenberg. Rosenberg is listed as a member of the SA. He was never a member of the SA, and I should like, in my turn, to bring this to the attention of the Tribunal.

SIR DAVID MAXWELL - FYFE: The defendants, of course, will have every chance of disproving these matters, My Lord, but they are all contained in the Indictment.

(There was a noise in the courtroom)

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I will begin again.

The defendants will have the opportunity of disproving these allegations, which are all contained in the Indictment; but in view of what has been said, I shall personally check the matter myself.

THE PRESIDENT: Yes.

SIR DAVID MAXWELL-FYFE: Then I proceed to deal with the Gestapo. Again the Tribunal will find the construction and history of the Gestapo set out in Appendix B of the Indictment, and the criminality alleged is set out in paragraph 1, 2, and 3 of Section D of my appendix. The second addendum, the Tribunal may care to note, gives the most detailed references to each of these alleged acts of criminality. The Prosecution submit that from these points which are mentioned it is clear that the first four of Mr. Justice Jackson's points are complied with. The provisions of Articles 7 and 8 of the Charter, in the submission of the Prosecution, make it impossible for the defense to rely on the official background of the Gestapo, and therefore, as I say, we submit that this clearly comes within the first four of Mr. Justice Jackson's points. If the Tribunal will refer to my Appendix B they will see that the defendants Goering, Frick, and Kaltenbrunner are alleged to be members, and in the latter part of that appendix we allege, as is the fact, that the crimes of these defendants were committed in their capacities as responsible chiefs of this organization.

Then we come to the SA. I again refer to paragraphs 1 and 2 of Section E of my Appendix A, and I ask the Tribunal to note that apart from the correct statement of its phases and periods of activity, each of the elements of criminality contained references to the transcript where these matters are proved. I remind the Tribunal of Mr. Justice Jackson's statement, which shows that the Prosecution have omitted all connected bodies, even including those who had only been members of the reserve, about which there can be any argument, even a sentimental argument, as to their full connection.

It might be convenient of I reminded the Tribunal of these sections.

THE PRESIDENT: We will adjourn now.

(A recess was taken until 1400 hours.)

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Official transcript of the International Military Tribunal, in the matter of The United States of America, the French Republic, The United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics, against Hermann Wilhelm Goering et al, Defendants, sitting at Nurnberg, Germany on 28 February 1946, 1400-1700, Lord Justice Lawrence presiding.

SIR DAVID MAXWELL-FYFE: If the Tribunal please, before the Tribunal adjourned I was about to mention again the bodies on the fringe of the SA, which the Prosecution did not seek to be included in the organizations.

First, wearers of the SA Party Badge. The Tribunal may remember that Colonel Storey explained that they were not strictly members. He wanted to have that point quite clear.

Secondly, SA Wehrmannschaften, who were internal defense or home guard units controlled by the SA, but not members of the SA.

Thirdly, SA members who were never in any part of the SA other than the reserve.

Fourthly, the NSKOV, the National Socialist League for Disabled Veterans, who were apparently incorporated in the SA, but from the names that have been given, and the membership, we do not ask for their inclusion.

In appendix B, the Tribunal will find the eight defendants alleged to be connected with the SA, and it is alleged by the Prosecution that the connection of the SA with the conspiracy was so intimate that all the acts of the defendant Goering would justify the declaration prayed for.

I now pass to the sixth and last group or organization, the General Staff and High Command of the German Armed Forces. As in this case the Prosecution have drawn an arbitrary line, I may perhaps be allowed to recall briefly its constitution.

If the Tribunal will be good enough to look at Appendix B of the Indictment, under this heading, page 37 of the English text, they will see that the first nine positions enumerated are special command or chief of staff positions. There were 22 holders of these positions between February 1938 and May 1945, of whom 18 are living. The tenth position, of Oberbefehlshaber, includes 110

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individual officers who held it. The whole group varied from a membership of 20 at the beginning of the war to about 50 in 1944 or 1945, that is, at any one time.

I remind the Tribunal, however, that the conjoining of these positions is not artificual in reality, because on pages 2115 and the following pages of Colonel Telford Taylor's presentation on it -- and I refer especially to pages 2125 and 2126 -- it will be seen how the holders of the positions enumerated met in fact and in the flesh. This, in our submission, clearly comes within the interpretation of "group" in the Charter, which, as Mr. Justice Jackson pointed out, has a wider connotation that "organization", and we submit that you cannot hold men in the top command against their will. It would be impossible for them to carry on such work on such a condition.

Under Section F of my Appendix A, read with the first addendum, there will be found not only the references in the transcript, but the references to the captured documents which prove, out of the mouths of the members of this group, the criminality alleged against them under each part of Article 6 of the Charter. These documents also show their actual knowledge and therefore a priori, their constructive knowledge of the nature of the act.

In my Appendix B.,the five defendants involved are set out, and in the latter part of that appendix, the connection of the group, and especially of the defendants Keitel and Jodl, is emphasized. It is submitted that these facts prevent any difficulty being encountered with regard to this group on any of the five criteria which we say should guide the Tribunal.

Finally, may I repeat that in our respectful submission the facts contained in Appendices A and B which are before the Tribunal in writing clearly indicate the findings of fact for which the Prosecution ask.

My friend, M. Champetier de Ribes presents the journal.

M. CHAMPETIER DE RIBES: Mr. President and gentlemen, I should be careful not to add anything to the very complete statement of Sir DavidMaxwell-Fyfe were it not that I desire, in full agreement with my fellow prosecutors, respectfully to draw the Tribunal's attention to two clauses of French municipal law which deal with questions comparable to those which we are considering

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today, and in connection with which I believe the French Legislature has had to solve some of the problems with which the Tribunal is concerned, and especially the question which the Tribunal has laid down, namely that of criminal organizations.

I shall merely mention Article 265 of the French Criminal Code which lays down the general principle of the association of criminals by enacting that:" Any association, whatever its duration or the number of its members, any understanding made with the object of preparing or committing crimes against the person or against the property, will constitute a crime against public peace."

That is why I should like to draw the attention of the Tribunal to this fact, that in the course of the last few years France has had to apply this general principle to organizations or associations which resembled greatly those which we are asking you to declare criminal.

It is known, gentlemen, that Nazism is a contagious disease, the ravages of which menace beyond the borders of the countries which it has contaminated. Thus, during the years 1934 to 1936, diverse groups had been formed in France, which following the example of their German and Italian models, were organized with the intention of substituting themselves for legal government in order to impose in the country that which they called order, and to create, in fact, disorder.

The French Republic in 1936 did what the Weimar Republic ought to have done. The law of the 10th of January 1936, promulgated on the 12th of January in the Official Gazette which I submit to the Tribunal, decreed dissolution of the groups and enacted severe penalties against their members. With the Tribunal's permission, I shall read the first two clauses of this law:

"Article I. Shall be dissolved, by decree of the President of the Republic in session with the Cabinet, all associations or de facto groups which:

"1. Would cause armed demonstrations in public thoroughfares.

"2. Or which, with the exception of military preparation societies sanctioned by the Government and societies for physical education or sport, which by their structure and their military organization would have the

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characteristics of a fighting group or a private militia.

"3. Or which would aim at jeopardizing the integrity of the national territory, or at attempting to alter by force the republican form of government.

"Article II. Any person who will have taken part in the maintenance or the reconstitution, direct or indirect, or the association or group as defined in Article I, will be punished by a term of six months to two years imprisonment, and a five of 16 to 5,000 francs."

The Tribunal will observe that by imposing severe penalties against members of these associations for the mere fact of "having taken part in the maintenanc or the reconstitution, direct or indirect, of the association", the law of the 10th of January 1936 has recognized and proclaimed the criminal character of the association.

In the second place, neither the criminal code nor the law of 10 January 1936 are concerned with the question as to whether the association

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tion involved constitutes an association which has legal personality.

Article 265 of the Criminal Code includes in its condemnation, not only any association which has legal personality, but also condemns any understanding made with the object of preparing or committing crimes against person or property. It also condemns any de facto Groups. In that way, the law of the 10th of January, 1936, speaking of de facto Groups or Associations, does not seek legally to define criminal organizations, and refers to the commonly accepted meaning and implication of the words "Group," or "Organization," as we today ask you to define them.

In the same way, after the liberation of our country, the French Government concerned itself with pursuing and punishing bad citizens who "even without offending against an existing criminal statute, will have made themselves guilty of any definitely anti-national activity." The decree of 26 August, 1944, promulgated in the Official Gazette of the 28th of August, created the penalty of national indignity, and after having given "a general definition of the offense" has "defined its extent by enumerating the essential facts which it comprises."

Thus, Article I of the decree of 26 August, 1944, states that, "The crime of national indignity is constituted" by the fact of "having participated in the body of collaboration, whichever it might have been, and more especially one of the following: Le Service d'Ordre Legionnaire (Legion of Order), La Milice (Militia), the Group called 'Collaboration,' La Phalange Africaine (African Phalanx), and so on.

The ordinance of the 26th of August, 1944, is much less concerned with defining the punishable offense than with enumerating the criminal Organizations to which the fact of having adhered constitutes the crime of national indignity. And whether these Organizations were legally constituted Organizations, as defined by Article 265 of the Penal Code, or merely de facto Groups, as qualified by the law of 1936, the ordinance does not define further the Organizations which are

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described as criminal. That is what we are asking you to do with respect to the German Organizations mentioned in the Indictment.

We are not asking you to condemn without having heard them men who, on the contrary, will be able to put forward their means of defense before a competent tribunal. We are asking you only to declare criminal, as was allowed by the French laws of 1936 and 1944, de facto Organizations without which it would have been impossible for a single man to attain the result that a great nation should fall so low in a few years, to the ranks of barbarism. It is the shame of our period that the conquest of science should be placed at the disposal of ancient barbarity. It is very true that technical progress is of no avail unless accompanied by moral progress.

Your sentence will signify for all nations in the world, and for the good of Germany itself, that before human liberty there existed a moral law which is imposed upon nations just as well as on individuals, and that it is criminal to violate that law.

GENERAL RUDENKO: Your Honors, let me tell you, first of all, that I accept the principle which has been expressed by my respected French and American colleagues, the principle with regard to the criminality of the Organizations. It seems to me that to clarify this question it is necessary to distinguish clearly two interwoven problems: first, the problem of the material law; just what Organizations and what individual members or Groups of individual members can be considered criminal, and also the problem of objective law; what evidence, what witnesses, and in what order these can be presented to agree to declare or to deny the criminality of this or that Organization.

First of all, as to the first question, it is necessary to amplify that the question of the criminal responsibility of an Organization does not stand before the Tribunal; neither does the question of the individual responsibility of the various members of an Organization, except those who are among the Defendants today,

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stand before the Tribunal. The Charter of the Tribunal provides, according to Article 9, that the examination or the trial of any individual or of any Organization is within the jurisdiction of the Tribunal. It is within the jurisdiction of the Tribunal to declare this or that Organization criminal if one of the Defendants belongs to the Organization.

Thus, we speak here about declaring an Organization criminal, and the Charter definitely provides the legal consequences of declaring an Organization criminal. As the Tribunal declares this or that Group, or Organization, criminal, then the competent national authorities of the signatory powers have a right to bring to trial locally members of Organizations. The nature of the Organizations is thereby considered clear.

Article 10 recognizes the situation. The Charter provides two legal results of declaring an Organization criminal: first, the right, but not the obligation, of the various national tribunals to bring to trial members of Organizations which the Tribunal declared criminal; and second, the obligation, but not the right, of the national tribunals to consider an Organization criminal if such an Organization was so declared by the International Military Tribunal.

In such a manner, the result of declaring an Organization criminal by the International Military Tribunal does not automatically mean that all members of the Organization will also be declared criminal by the national tribunals; neither does it mean that without exception all members of such an Organization must be brought to trial. The question of individual guilt and of individual responsibility of the separate members of the criminal Organizations is wholly, and without exception, within the jurisdiction of the national tribunal.

As has already been pointed out, Article 10 of the Charter limits the jurisdiction of the national tribunal in just one way. The national tribunal cannot bring to trial or cannot argue the criminality of any Organizations which have already been declared criminal by the International Military Tribunal.

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My colleagues have already tendered valuable information about the legal codes of the respective countries. Under American law, French law and also the Soviet legal code, it is provided that membership in an Organization which has criminal aims makes an individual liable. There are two legal decrees on the subject. These laws provide for the guilt of members of criminal Organizations. They are considered criminals, not only for committing crimes, but also for belonging to an Organization which is considered criminal. The very fact of belonging to an Organization, the law states, makes a person liable to prosecution. If a person is proved to be a member of a criminal Organization, even though the person is not formally a member of the Organization, but if he is known as such and he is demonstrated to have participated in or aided in the activities of such an Organization, and if any participation in the activities or objectives of criminal Organizations is shown, then the person can be brought to trial.

However, belonging to a criminal Organization formally only, does not cover the guilt of the person. Naturally, the Court must know just what was the nature of the Organization; what were the objectives of the Organization. It is immaterial whether an individual member knew or understood all the actions and all the doctrines of the Organization, whether he was acquainted with all the other members of the Organization.

On the basis of the legal code, especially in Fascist Germany, where there existed a whole series of Organizations established by the Government, now considered criminal, it is impossible to demand that every member be acquainted with all the actions and all the members and all the directives of the Organizations.

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May I now move on the next problem. It appears to me that there is a certain degree of complexity attached to the problem of the criminal organizations. There is very extensive correspondaence, much material, that has been submitted to the Tribunal on the subject of these organizations. Such abundance of discussion, it appears to me, comes from an incorrect interpretation attached to the term "criminal organization". As long as we know the fact that the question of the individual responsibility of the individual members is fully within the jurisdiction of the various national courts of the Tribunal, the general question of whether the organization is declared criminal or not is much easier to follow.

According to the Charter on the question of declaring an organization criminal, the Tribunal will decide in connection with individual defendants Article 9 states that in examining the materials with regard to each defendant, the Tribunal can - - and so follows the rest. Therefore, the conclusion is that the facts which decide the solution of the question as to whether an organization is or is not criminal, consist of whether there is before us today among the defendants a representative of this or that organization. It is well known in the present trial that all the organizations whom the prosecution want to be declared criminal are represented on the bench of the defendants. For that reason alone, there has passed through the hands of the Tribunal a great deal of material and evidence relating to the criminal nature of the organizations which these defendants have represented.

Under such conditions, the necessity of calling special witnesses to testify about this or that organization can take place only if supplementary evidence is necessary. And even then, the Tribunal has stated in Article 9 that it is up to the Tribunal to acquiesce in or to refuse the calling or the introduction of supplementary evidence. It is impossible to deny the the necessity or the desirability of supplementary evidence with regard to any organization. The Charter of the Tribunal states very definitely that after the indictment has been made, the Tribunal will do that which it considers necessary with regard to the Prosecution 's request for declaring this or that organization criminal. Any member of an organization has a

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right to request that the Tribunal permit him to be heard on whether the organization was criminal. However, this was introduced into the Charter of the Tribunal for the sake of the justice. It now appears that this article is used for other purposes.

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If what has been provided for in Article 9 extends widely enough, and if it already provides for calling witnesses with regard to the criminality of this or that organization, any of the evidence presented by the Prosecutors of the four countries has already given enough evidence for the Tribunal to decide whether an organization is criminal, and supplementary evidence does not appear necessary.

We should also note that Article 10 of the Charter explains that to declare an organization criminal does not necessarily lead to an automatic bringing to trial of all members of that organization without exception. It means that all questions about bringing any member to trial and about the responsibility of individual members will be decided by the National Tribunals.

This is all I wanted to state, in addition to what has been stated by my colleagues.

THE PRESIDENT: Have the defendants' counsel arranged among themselves in what order they wish to be heard?

DR. KUBUSCHOK (Counsel for the Reichsregierung):

As counsel for the Reichsregierung, which in the Indictment has a first place as a "criminal organization", I have, according to the decision of the Court, the duty of giving my opinion regarding the procedure of presenting evidence. Since, in so doing, I have to mention general points of view which affect in the same way all the six organizations under indictment, it isprobable that my statements will be very similar to the opinions of other defendants' counsel. However, they also would like to utter their personal opinions.

The Defense understands the decision of the Court of the 14th of January 1946, to mean that at this stage of the procedure the Defense should not in all detail take a position as to the Prosecutions' statements, such as they have been made in the form of accusations today and mentioned in detail; neither to the term of criminal organizations in the sense of the Charter, or other prerogatives of a decision as a criminal organization; but only to the question, which matters of proof are relevant and how evidence shll be presented. Therefore, I shall only speak about principal questions inasmuch as this seems necessary today.

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First, I would like to speak about the content and the consequence of a verdict as demanded. The six organizations under indictment are supposed to be, according to the Prosecution, declared in their entirety as criminal organizations. A procedure of thatkind would present, in the jurisprudence of all states, an absolute novum.

As we know, this motion is not uninfluenced by the fact that, contrary to other nations, in England, and even more so in the United States, for prosecutive reasons in some cases also companies and corporations as such can be a case before a court. This is a new development of the law on the basis of the dominant position which companies and corporations have acquired in economic life.

This position made their punishment fitting in certain cases. By such punishment they would, however, only be affected to the extent in which they could be affected in their economic sphere, that is to say, by imposition of fines. Of course that was concerned only with very definite crimes, mostly of an administrative nature.

The American Chief Prosecutor and the other members of the Prosecution have mentioned a number of judgments, also from German penal law, in which organizations have been considered or declared criminal. In these verdicts, however -- and that is the decisive factor -- there were always individuals only judged as defendants, never organizations as such. Never were organizations under their name considered criminal, declared criminal.

A trial procedure, however, which, asthis one here, concerns severely the organizations as such, as well as all the members who are personally not indicted -- and I now refer to Law Number 10 of the Allied Control Council -- and which can give them the highest sentence, the sentence of death, has never yet in the history of jurisprudence been discussed, debated or used.

The organizations under indictment are organizations of a very heterogenous forms and structure. I do not have to point out today whether they were always a unit, a constructed unit. For this trial it is only essential that the organizations under indictment have been dissolved by law of the Military Government. Therefore, at present they are non-existent. What still exists are only the individual former members, who, therefore, in

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reality are the defendants of this trial, and only under the name of the former organization as a collective designation can be included.

Independently of this question, however, of the question of the non-existence of the organizations, it can be seen from the consequences of the procedure that this is indeed a procedure in toto against the individual members of the organization, and this for the following reasons:

First, to declare an organization as criminal means banishment and branding as criminal, not only of the organization as such, but, first of all, of each individual member. Such a declaration, therefore, means a final condemnation of each invidiual member to the punishment of loss of honor. This consequence of banishment and branding is unavoidable and ineradicable, especially if that verdict has been made by a court with the rank of importance of the International Military Tribunal and before the forum of the entire world. The consequence of such an ostracism would exist for each member of the organization and would adhere to them, regardless of whether the subsequent proceedings as provided for in Article 10 of the Charter would be carried out against this individual member or not.

Second, in procedural consideration, the verdict that has been asked for provides the possibility of a criminal penalty for each individual member of the Organization. In the subsequent procedure, according to Article 10 of the Charter, it is taken for granted that the criminal character of the organization has been definitely defined.

As an interpretation for that, in the meantime Law Number 10 of the Allied Control Council has been issued on the 20th of December 1945. This makes punishable the mere membership in an organization which has been declared by The International Military Tribunal a criminal one. That alone is declared a punishable crime. The highest penalties are provided, up to life sentence or death penalty.

The procedure, according to Law Number 10, is only concerned with the fact of membership upon which the punishment depends. In this procedure only grounds for personal exoneration are important, such as legal irresponsibility, error or coercion. These only concern the membership as such and will come up only in a very few cases.

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As far as the character of the organization is concerned, however, the criminal aims and actions of members of the organization, especially the individual member's knowledge of these, all these are matters that are no more debatable, according to Law Number 10. The decision has already been reached in the trial against the organizations. Therefore, the procedure against the organizations represents the biggest and most important part of the trial against every individual member thereof, while the subsequent trial, according to Law Number 10, only draws the conclusion.

On the question of consequence of a verdict, its numerical aspect should be touched upon.

The SA, at the beginning of the war in 1939, had about 2½ million active members, to which should be added approximately one to two million who, during the previous 18 years, either left the SA or had to leave on account of their military service, all together up to 4½ million.

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As regarding the SS, it has not yet been possible for my colleagues to give a close estimate. It will have to be considered that the Waffen SS alone had an active membership of several hundred thousand men. If we consider the war losses, which were very considerable among the fighting units but which also to a certain extent are included, we also find with regard to the SS that the figure goes into the millions.

The Leadership Corps had, after 1933, always a fixed membership of about 600,000 to 700,000 members. The changes in the official personnel were very strong. On the average, we have to take into account two complete turn-overs during the entire time so that here, also, the complete figure will be about 2 million.

The entire figure included in this procedure is a very large one. The limitation which has been put before the Tribunal today would of course reduce that number, but not to a large extent. As a matter of principle, it will certainly make no difference whether of this very large number which I have just mentioned, one-half, a third or a quarter of the adult male population of Germany is included. If we consider the losses during the war of this generation, we can say with great certainty that the Prosecution would include a very considerable part of the male adult German population.

I shall speak now about the term of criminal organization. Before we declare an organization as criminal we have to consider the criminal character as seen from Article 9, Paragraph 2, of the Charter. The Charter does not interpret either the term of criminal character nor the term of a criminal organization.

If we ask according to which legal code the omission in the Charter could be corrected, we have to go by the general principle of the local law, which, first of all, of course would be German law. But that doesn't bring us any further, because here also in both terms, and according to every legal code of the world, we are confronted with a terra nova in a legal sense. The Defense also here reserves the right for a detailed opinion later on for the final presentation.

In any case, we are of the opinion that within the framework of the Charte on account of the grave and far-reaching consequences which I have mentioned before, the statement declaring these organizations criminal can only be made if, first, either the original purpose--that is, the constitution, the charter of the organization--was designed for the commission of crimes in the sense of

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Article 6 of the Charter, and if this original purpose was known to all members.

Or, (b), if the original purpose of the organization was not criminal, if all members during a certain time have participated in the planning and application of crimes in the sense of Article 6 of the Charter, and knowingly participated. Here, also, it is essential that this development has led to the fact that these crimes were typical actions of the organization, because then only can we speak of an organization or of an individual human being of a criminal character.

According to this interpretation, we identify the term of a criminal organization, following the sense of Articles 9 to 11 of the Charter, primarily as the term of a criminal conspiracy, Komplott, which in the former German and Italian legal code plays an important role; furthermore, with the term of conspiracy, and that is with or without execution, in English or American common law. Further, the term of Mordkomplott, conspiracy for the purpose of committing murder, in the sense of Paragraph 49-b of the present Reich Penal Code. And, finally, with the term of a common plan or conspiracy in the sense of Article 6 of the Charter, here also with or without action of executing it.

All these penal codes have in common that a verdict can only be made on these persons who have takenpart in the criminal organization knowing its purposes.

In my opinion, no negligence can be sufficient in judging the crime; following the general principle that in cases of severe punishment, here threatened as far as capital punishment, that there must always be full criminal evidence, negligence would not be sufficient. Therefore, as a matter of principle, it has to be demanded for this Tribunal that an organization under indictment can only be declared a criminal one if it has been ascertained that:

First, the aims of the organization were criminal in the sense of Article 6 of the Charter. And, furthermore, that all members at least knew about these criminal aims. This is also essential because, as it has been said before, this trial before the International Military Tribunal presents already the main part of the procedure which will ascertain the guilt of each individual member of the organizations.

Justice does not permit that members should all be comprised in a verdict who did not have the knowledge of which I spoke, and are therefore subjectively free of guilt.

Also, the consequences of which Justice Jackson has spoken will be excluded, that in case they would not be convicted it would be a triumph for those who are guilty. With him, I am of the opinion that the guilty ones, regardless of their number, should be brought to punishment.

Considerations about procedure, about the opportunity of procedure, should not lead to a solution where, aside from the guilty ones, also a large number of innocent ones would be punished.

Therefore, to come to the main question, what is relevant. The relevancy and admissibility of proof depends on a definition of the criminal organization and of its criminal character, and from my definition I contend that the following points are relevant:

(a) That the organizations in question, according to their charter or statute, did not have any criminal aims or purposes, and no criminal aims in the sense of Article 6 of the Charter.

(b) That within the organization, or in connection with it, crimes in the sense of Article 6 had not, or at least had not continuously been committed during a certain length of time.

(c) That a certain number of members had no knowledge of any possible criminal constitution or criminal purpose or the continuous commission of crimes, according to Article 6, and that they did not agree with these facts.

(d) That a certain number of members or certain groups, independent groups, joined these organizations under compulsion or illusion or by orders from higher authorities.

(e) That a certain number of members, without their own fault, by honorary degree of honorary member, became members of these organizations.

Since I know fairly well that in the questions which have to be decided we are confronted with a terra nova, and since I believe that in the further taking up of matters of proof we will receive much inspiration, it therefore follows that the Tribunal cannot at this stage of the procedure make a final definition; and I ask to admit the evidence to the furthest extent..

Finally, I come to the question, how evidence can be practically presented and how hearings of the membership, according to Article 9, Paragraph 2, of the Charter, can be made possible.

The principles which are in all countries for penal law provide for every defendant certain rights before the court; but the most important principles



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are the principle of a direct, oral testimony, and the right for counsel and legal hearing. Since, according to my statements, the real defendants are the members of the organizations, these rights should be accorded to each individual member of the organizations. In spite of this point of view, which



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will still be discussed in detail in our final presentation, and in reserving all possible rights, the Defense does not overlook the fact that this is practically impossible within the framework of this procedure. Its solution must be found, since the Prosecution has raised the accusation against the organizations, on the basis of the Charter and in the present form. This leads to the necessity to conduct the procedure wherein the aim of all people concerned can only be to find a best possible solution on a declaration to come as close as possible in general and in considering the point of view of all individuals.

In this connection the Defense is realizing its duty, in the same way as the Prosecution, to help for a fair decision by the Tribunal.

If now the tremendous number of people who are affected by the Prosecution precludes by tremendous difficulties coming to a sensible, reasonable solution of this problem, there must still be sufficient grounds for judgment as well as for the aims of the organizations, the actions and the subjective point of view of individual members of the organization.

To make any headway in this procedure, it has to be tried, by typifying, to come to some decision for all of them. We do not ignore the great difficulties in coming to a just decision, given the use of a typical phenomenon as basis for judgment. It would be quite impossible to try to bring a lot of individual witnesses before the Court in order to provide a clear picture about the typical case. The only way, in our opinion, in which it is possible to bring individual testimony, is to separate it locally and in matter of time from this Tribunal. One means to achieve this can be found in the investigation of individual members We believe that the investigation of individual cases could be taken care of in a sure form in such a way that in each camp one or more speakers should to this work, that is to say, of course, under the supervision and with the assistance of the defendant's counsel. That then these speakers as witnesses could present to the Tribunal a picture of the actions with the subjective point of view of individual members.

We believe that there would be a way to get a clear and conscientious picture, and that would be that these speakers should make affidavits about the main points which have been specified by the prosecution; that they should get affidavits from inmates of the camps.

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These speakers could then say under oath to what percentage, on the basis of these affidavits, individual inmates of the camps had taken part in the criminal actions mentioned in the Prosecution's case, or had known anything about it.

Certainly there are certain difficulties to be considered in order to get a true picture. In order to get a true picture, one will have to take the suspicion away from the individual inmates, but that they could present material in their own favor, that they could present material which would serve to prosecute them.

We consider it, therefore, necessary that these affidavits should be presented to the Court as evidence; that the Prosecution should make a statement that this material will not be used for personal indictment. With this statement no immunity would be expressed for individual members, but the individual inmates of the camp would be assured that the statement he has made under oath would not be an accusation against himself in a future proceeding.

If the Prosecution does not want to do this, there will still be the possibility, without using these affidavits, to get information based on the testimony of these speakers, who could make statements about the percentage of the people who took part in the criminal activities and those who didn't.

THE PRESIDENT: Since you haven't finished, I think we had better adjourn for ten minutes.

( a recess was taken.)

DR. KUBUSCHOK: Before the recess I pointed out a suggestion that would make it easier to recognize the action of those who would come into consideration in this trial. The hearing of this evidence would have to be extended to a sufficient number of camps in all the zones of occupation. From the results of the hearing of this evidence, there could be drawn from the typical phenomena the conclusion regarding the criminal activity and attitude of the individual member of the organization, or the opposite, and at the same time, finally, a conclusion regarding the presence or absence of the criminal character of the organization.

If the Prosecution is in agreement with the Defense so far, I believe that we have found a way of proving the relevant questions, including all

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positive and negative elements.

To the extent that the hearing of inmates of camps should not suffice, which is particularly true of the SA, there will come into question the hearing of all members of the organization who are not in custody. Here, too, a way would probably be found which would then both make possible and make more easy the execution of the tasks of the Tribunal.

DR. SERVATIUS: I appear in behalf of the Leadership Corps.

I should like to take a position toward the questions that have come up now before the Court. It is not possible for me to take an attitude toward the profound and well presented case that Justice Jackson has just finished. I should like to simply say a few words on behalf of a number of my colleagues and then we should like to take our definitive position toward the presentation of Justice Jackson. Perhaps the Tribunal will give us the opportunity to do this later.

I should like to take an attitude toward this question in a more technical sense, in order to fulfill my duty of presenting the Defense's attitude toward these questions.

In the first question it was asked, which evidence is admissible and which of the proofs should be presented in the main trial here before this Tribunal? The answer is that those proofs are relevant at all times that assist in the demonstration of criminality. When we examine the concept, "criminality," it is seen that there is no factual situation in criminal law, nor can there be one, for it is not here a question of determining facts but of a world judgment, whether an act is criminal in the same way that it is an evaluation, whether the act is good or bad. Consequently, the Charter does not oblige the Tribunal to pass judgment and declare such-and-such to be criminal. It simply states that the Tribunal <u>may</u> pass such a verdict, but not that it <u>must</u>.

I can thus be seen that the Tribunal is here confronted with the task which is basically different from the activity of a judge. A judge is obliged when certain facts are presented to his attention to pass judgment, but this Tribunal is to determine the culpability of a set of facts on the basis of which a court will later deliver judgment. Such a

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task is the job of a legislator and not of a judge. The Tribunal here fulfills this task in the capacity of a legislature, determines what is criminal and sets a precedent. In this way the Tribunal creates a precedent for the judges in the individual trials that will follow. The same precedent which will be given to the judge is the basis for his judgment. In this way the forms of evidence are reversed which Judge Jackson referred to and I am prevented from making the objection that the activity of the Tribunal is here that of a legislature. It can also be seen that without the intervention of the Tribunal the Signatory Powers could have determined without further ado that all members of the organization should be put on trial for their membership in the organization.

Law No. 10 of the Allied Control Council that was often mentioned today corroborates this interpretation, for this is the basis for the law that is expected of this Tribunal. The examples that have here been presented by Justice Jackson to substantiate the criminal nature of the organization show again and again that it is a question of laws and not of judgements.

The characteristic of the legislative function determines that considerations of practicality are most important. Justice Jackson asked in a previous presentation that he might proceed without further ado with the members of the organizations.

It is legal consideration, legal-political considerations on an ethical basis. It consequently follows that the members of the organizations are punishable, and "punishable" is equivalent to "criminal".

( A short interruption.)

THE PRESIDENT: Yes, you may continue.

DR. SERVATIUS: In order to determine the fact, the Tribunal as legislature must collect the material to be used. The judge can, on the basis of the indication given to him, easily determine what is relevant to the proof, of what must be proved, and therefore what he can admit as proof.

It is characteristic that this determination here in this matter makes for difficulty. The legislator behaves differently from the judge. He contemplates the phenomena and signs, all that are relevant, that are important, for the content of his law. In this matter he must have a picture

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of the entire problem and must take into consideration both the good and bad side of the matter.

It is a basis principle of justice that only the guilty be punished. If the legislator wishes to achieve this, he must examine whether only guilty people will be affected by his laws. He must consequently also investigate the objections that any person affected by his law could make. The innocent person is protected in this way, that is the individual case the guilt of the individual must be proved unless the legislator actually intends imprisoning the person without proof.

Every killing of a human being is punishable, whether the person who who did the deed wished death or not. If the legislator does not want to permit such an objection, then he must himself examine the material that leads to such an extraordinary measure.

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The material to be examined depends therein from the content of the law that is to be passed. Sofar as the individual trials that are to come later, where all the objections remain open, the Tribunal does not have to concern itself with it.

The Tribunal must consider whether the innocent people will have their rights guaranteed in the individual trial later, and whether their right will be guaranteed. It is absolutely necessary to the Tribunal to present everything which the perpetrator later in an individual trial would not have an opportunity to concern itself.

In anticipation of the ruling of the Tribunal, it has already been determined in law No. 10 that every member can be punished, and the punishment itself determined of that we have heard in previous presentations. It appears as if the Tribunal can simply pass a judgment en bloc without having any other right to modify it, and consequently without any influence on the legal effect of its verdict, but such an effect is in contradiction both to the basic principles of the Yalta conference, which was that of transferring to the Tribunal the legal powers, and, of the signatory powers. Necessarily, in order to do just the principle of justice, namely, that of punishing only the guilty, is on the basis of examination of the relationship of the facts through the hearing of the members in question.

Consequently, the Tribunal must have the right of determining individual cases, or its disposition of their punishability, to determine the objections which will remain open to the individual; and the Tribunal must also be able to demonstrate the effect of its judgment by regulation of the capital punishment. I believe that according to what I have heard today, nothing has been said to contradict this.

According to the sense of the Charter, the Tribunal may not, or, according to the sense of the Charter the Tribunal is not allowed to transfer its responsibility to the individual trial, in which by simply drawing back, and leaving the decision in this matter up to the court where the introduction of which and the acceptance of which might be very different.

The members of the organization have specifically the right to be heard before the International Military Tribunal, and in consideration of the significance of the situation, it will have the right in every case itself to a serious, moderate adjudication of all those concerned. To what extent then

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can the Tribunal concern itself with the material in the finishing of the evidence. I believe the Tribunal in order to determine the punishability must investigate the most typical relation of, and, whether each individual can be transferred to a later trial. This distinction between typical and individual, however, is not easy.

The presentation of the principle has a double meaning. On the one hand the mentioning of a member by saying that he did not know the criminal nature of the organization could mean, on the one hand, that such a purpose never existed, and, on the other hand, it might mean that a member simply did not know what actually the present criminal purposes of the organization were. The first obviously is of the effect on the organization, and the second is one of the effect on the individual. On the basis of this presentation, I should like to answer that question to the Tribunal as follows:

The criminal facts in a legal sense of the word are not here present in determining of the criminality, or to the determination of the punishability as a legislating task of the Tribunal. Relative to this fact in a legal sense of the terms is in truth the examination of the legislative material to which the objections of the members of this group organization belong. To what extent the Tribunal itself must have to examine the material depends on the extent and the effect to which it can and will give to it its verdict. Only that it is typical -- that it is not typical, and as a legal consideration unimportant, can it be left to the individual trial.

Under point two and three the Tribunal asked the question regarding the limiting of the circle of the membership and the length of time of the criminality. Both questions touch the same problem, namely, whether such a limitation is dependent on a motion on the part of the Prosecution or whether the Tribunal itself can limit the content of the verdict it passes.

I believe Justice Jackson today expressed the opinion that the Tribunal has the right, but as regards the political leaders, the Prosecution reserves to itself the right, in case a limitation is asked regarding the membership, to undertake new trials against those members who are excluded from this one, or to take other measures.

However, such a right is not given to the Prosecution in the Charter. It also stands in contravention of the natural rulings of the Tribunal and with its decisions and, possibly, to an acquital ruling, which could not be

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eliminated by an objection on the part of the Prosecution. To such a limiting motion, the evidence to be examined can not be limited. For the judgment on the indicted organizations can include this material in its whole. It is not permissable to take out sick elements of a group and to pass judgment on those sick elements and on them to consider the entire organization as criminal.

That that which is to be considered a group or an organization by the Tribunal is not to be determined at the discretion of the Prosecution is also to be seen in Article 9, Paragraph 1 of the Charter, according to which the criminal character must stand in some relationship to the acts of one of the main defendants.

This can only be understood to mean that the organization in its membership, temporarily, must be influenced by the actions of one of the major defendants. However, this is not for the Prosecution to decide, but for the Tribunal.

Consequently, I should like to answer questions two and three as follows. Question two: A limiting of the incriminating period can not depend on a motion of the Prosecution. The Tribunal can and must itself limit the length of time if the organizations or groups were not throughout the whole period of their existence criminal. If the actions of the main defendant, as a member of the organization or group, were not incriminating during the whole period of the existence of the organization, then such a limitation must follow.

Question three: For the limiting of the circle of membership, the same is true as is true for the limitation of the period of time.

The Tribunal can on its own iniative limit the effect that its verdict will carry in the case of all groups and organizations. It must undertake this limitation if the actions of the main defendant in his capacity as member of the organization are not to incriminate certain cirdes of people. A limitation of the indictment or the effect of the judgment does not limit the evidence material for the groups or organizations.

Those were the remarks I wanted to make in answer to the questions of the Tribunal. I would also now like to take an attitude toward a question that was brought up today; namely, the right to a legal hearing, if the Tribunal permit me to enter into this question.

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According to Article 10 of the Charter, every member of an organization can be put on trial if the organization is held to be criminal. The decision is left up to the Tribunal. The essential task of the Tribunal is to hear the case. Without the hearing of the individual, a judgment is impossible, and there could be no verdict.

So far the Defense has about 15,000 applications from about 50,000 members, and in order that the Tribunal should not reach the false conclusion that most of the members consider themselves guilty, I must say that such guilt is disputed by all those who have submitted applications. I shall go into the reasons why so few applications have been submitted and I shall show that the omission of other applications did not rest on their tacitly accepting their guilt. There is no lack of interest or disregard for the Court which are the cause of this slight number of applications.

The statements made in the press and the radio regarding the right to be heard took place at a time when in the destroyed cities there were few newspapers being published and radios were a rarity. The announcement took place at a time of paper shortage, and for the most part were simply not understood.

In the internment camps, where a great number of people affected were interned, the Tribunal ordered an announcement to be made. To what extent this announcement actually was made, I have not been able to determine. Justice Jackson showed various documents this morning and I shall from them be able to inform myself.

But the fact that so few applications have been made gives cause for thought but to the extent that the people affected have even known of their right, it was apparently so far not possible for them to make applications to the Court. At the time of the announcement, the postal service was not working between the various zones, and there are still no postal connections with Austria, where there are tens of thousands of men in custody.

In the announcement to the organizations, two ways were used to replace the lack of postal facilities to make these announcements public. Both of them proved to be insufficient and are the main reason why we have so few applications. Those members who are not in custody were to submit their applications at the nearest military station.

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I know of no case in which an application was made through these channels. The attempt to use this way came to naught from the lack of cooperation of the offices, for which I might give here a characteristic example.

It was said that they should submit their applications to the commanding officer of their camp. Only in the case of a few camps, weeks and months after the beginning of the trial, were the applications received and, even so, only from a part of the camps in the American and British zone and from a camp in the United States. From the Soviet, Polish and French zones, as well as from Austria, and other camps in foreign countries, no applications have been received, so far as I know. I shall leave it to the Tribunal to form its opinion of these facts.

Almost immediately the events showed, however, that an accusation of the members of the organizations cannot be the reason. I should like after many difficulties to point out only one striking example which will give a picture of the situation.

At one camp, roughly 4,000 members of the various organizations asked, in November 1945, to make use of their right. A few days ago I was told in a camp by a guard officer that at that time no applications were permitted since those in custody, according to the rules of the camp, could communicate with anyone outside the camp. If the application was to be transmitted further, an army order would be instituted. However, there was no such order and the present restrictions were strictly adjered to.

Another reason for the lack of application in these circumstances is that those concerned had certain disadvantages. The care was expressed that the CIC would persecute the people who applied because of their application. This fear was particularly inspired by the fact that the announcement of the right to make applications was associated with the notice that the appliers would have no sort of immunity. The effect of this was that even those who were not in custody, of whom only in the most infrequent cases did any submit application and then frequently anonymously, and then under false names.

It would have been welcomed if the Tribunal could inform public opinion that such fears are without foundation and that the participation of all is invited so that a falsely b sed decision can be avoided. Here if that were

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done a large part of the lack of applications would have been met.

From all this it can be seen that already the first stage of the making of applications has showed such serious deficiencies that the legal theory is so far usury. But even those applications that have been received are to that extent worthless with a few exceptions, and for the following reasons the Tribunal shall on the nasis of the application decide whether the person has a rig to a hearing. But this can, for practical purposes, only occur if these applica tions give also the reasons for the application. Such reasons are entirely lac ing in the application or are irrelevant.

An application with no contents or an application that simply sticks to generalities can form no basis for judgment. In a part of the application the person applying does not even mention his official function as a member of the organization or his civilian profession. This faulty form of application can b traced back in the case of the men in custody by issuing regulations of the camp commander that, namely, a provision allowing only block or group applications or prescribing certain forms to be filled out. For all those effected, whether in custody or not, a sensible establishment of the reasons for the application is not possible because those accused only know their organizations as "criminal", but they do not know in what this criminality consists.

As far as further applications are made in the individual cases, these are directed against the purely assumed contents of the indictment. In order to relieve the situation, the defense counsel have visited various camps to find out what was wrong and to collect the pertinent information. I shall not go in the difficulties on this activity. I should not like to go into the limitation placed on the length of time that we could stay in the camp, etc., but I must mention that the success of the visits to the camps was lacking as far as the sworn affidavits collected in the camps and the written presentations of the members in custody which until today did not come into my hands. They were given to the camp commander, but they have not yet reached me.

Under these circumstances it can be seen that today, three months after the beginning of the trial, even the technical basis for the trial, for the realisation of the hearing of the members of the organizations have not been provided. Defense counsel for the large organizations are not in a position

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to make up for this lost time in a short period of time now. On the other hand, the actual material is extremely exhaustive. In the case of the political leaders there are twenty or so categories, such as the workers' front propaganda section, organization section, and so forth, w hich must be examined as to their official function and financial function and as to their criminality. None of this can be ignored, and even the appearance of less than careful treatment of the subject must be avoided. I shall not enter into the difficulties that confront the defense counsel. It is based on the fact

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that certain question of law and procedure have only now been explained by the Prosecution.

The fact is that these members in custody are particularly interested that their case should be decided quickly. Nevertheless, we are obliged by circumstances to make an application. Namely, I apply that the case against the groups and organizations that are to be declared criminal should be separated from the main trial and be carried out as an individual subsequent trial. This application is in accordance with the particular nature of the trial of which I spoke at the beginning of my brief.

I should like to add to my application a suggestion regarding the possibility of a legal hearing. Here I am obliged, because of the suggestions made this morning regarding the carrying out of the hearing of the members of the organization -- according to that suggestion, an officer should carry out these interrogations. I cannot be energetic enough in objecting to this suggestion. In my opinion, it is one of the main rights of the defense counsel to collect his own information and it is the right of every defendant to speak with his counsel. It would be incomprehensible if the Allied Prosecution carries on both its prosecution and our defense. One did not expect that an officer would have such objectivity in such a matter nor such understanding for the feelings of the person he was interrogating as would be necessary.

My application is consequently this: That in every camp a German lawyer should be present who receives his information from the main defense counsel and instructs the members in the individual camp and collects his information. Then, in a relatively short period of time, a selection of the material could be carried out by the defense, both in what effects the individual, as well as the material that is to be submitted to the Tribunal as evidence.

Elimination of defense counsel, as was suggested this morning by the Prosecution, is objectionable, and I should really have to seriously consider how I could carry on my defense if such a suggestion were entertained by the Tribunal.

DR. MERKEL (Counsel for Gestapo): Regarding the general questions concerning the admissibility of declaring an organization criminal, on the

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question of the technical submission of evidence and on the general criminal character of the organizations, I prefer what my colleagues has just said. I have simply a few additional remarks to make.

Regarding the question of applications, I can say from my own experinece that it has also affected me strangley that the length of time that passed between the formulation of individual applications in the individual camps andtheir arrival in the hands of the defense were extraordinarily long. I should like to mention, for example, that a few days ago we received applications from a camp that were drawn up in November or December. I, myself, in order to get information, sent letters to camps and I sent them as much as six or seven weeks ago and I have so far received no answer to these letters.

In the Camp Herzbruck, for example, a detailed application from a member of the SS and Gestapo was made and was supposed to have been sent to the defense counsel. Neither the defense counsel nor myself have received this application. I have here applications from members of the Gestapo. In my opinion, this is one of thereasons why there are so few, that a large number of those in custody do not know that they are being represented in this trial.

The announcement of this fact, in the camps, took place in November of last year. Defense counsel for the organization, according to the record, on 17th of December, were appointed only after that date. The pertinency of my objection can be assumed from the following: About three weeks ago, in a German newspaper an article appeared regarding the question of the organization and in this article it states literally that the organizations are not represented in the Nurnberg trial. It is, however, a fact that in the first part of the defense, for months, counsel for the organizations have been sitting -- even the public doesn't know we are here -- how much less the inmates of camps know that they are being represented. That is about all I had on that subject to say.

I also take the point of view that the question whether here the organizations in their entirety can be accused, is an absolute innovation in jurisprudence and that it is something which, in its extent and its effects, shakes the very foundations of law. Organizations areto be judged which

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not existed for over almost a year. In the juridical procedure of all countries, it is a basic principle, that the person being defended should still be alive, which here is not the case.

According to Justice Jackson's statements today, the organizations, the Gestapo and SS, should be held responsible for the liquidation of the Jews in the East. He pointed out that the millions of Jews who were killed and the impossibility of determining who were the individual perpetrators, should be the reason why the organization should be made guilty of these acts. Of course, the defense is not convinced of that and its point of view is that the guilty individuals -- but only the guilty individuals -- should be punished.

It is a fact, for example, that in the case of an Einsatzgruppe of the SD, it was suggested that in the liquidation of the Jews in the East, only about two hundred members of the Gestapo belonged to this Enisatzgruppe. In a total number of 45,000 to 50,000 members of the Gestapo, this figure of two hundred is a very very small one. In a general verdict against, for instance, the Gestapo, 45,000 people and more would be concerned who had absolutely nothing to do with this matter. I refer to the example of a mass murderer who cannot be caught and whose family is taken into custody in his place and condemned.

In consideration of the very important presentations being made in this matter, I request the Tribunal for permission to address the Tribunal after having had time to examine what has been said today. I should like to take an attitude towards only a few questions today; first of all, to the question of the time during which the organizations are to be considered as criminal. Here I must assert that at least in the year 1939, the case has been such that the prosecution is concerned with the crimes that took place after the beginning of the war in 1939. Only such crimes are laid at the feet of the Gestapo.

THE PRESIDENT: Will you repeat your last sentence?

DR. MERKEL: Regarding the length of time, I should like to say that until the year 1939, acts cannot be seen as criminal because they took place on the basis of a legal Reich organization and the indictment actually accuses the Gestapo of crimes that were committed only after 1939, after the beginning of the war.

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The Prosecution further took excerpts from the Indictment. I refer to an application made in December. I determine that no only the secretarial personnel be eliminated from the charges in the Indictment. The reason why the Indictment against the secretarial personnel was eliminated was that according to the conviction of the Prosecution, this secretarial personnel had nothing to do with the crimes of which the Gestapo is accused.

I shall further have to consider whether the administrative officials of the Gestapo, which make up about 70% of the whole membership of the Gestapo, should be exempted from the Indictment. As far as I can see from the applications I have before me so far, they are almost exclusively from such administrative officials. These officials were trained only in the field of administration. There were no criminal elements among these people. They were not schooled in criminality. They could not be used for the execution of any violent or criminal actions nor could have been responsible for them because they had no executive power. They were active only

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in matters of personnel and economy; for example, in the appointments of officials, promotions, dismissals, and so forth; economic matters, keeping of books, and taking care of the offices, and what not. These are all things with which the executive branch of the Gestapo was concerned and we must consider that these things have nothing to do with the crimes of which the Gestapo was concerned and these people should be exempted from the Indictment just as the secretorial personnel has been exempted.

Only one other point I should like to bring up and that is the question of voluntary joining of an organization. On the 7th of June, 1945, Justice Jackson, in his communication to the President of the United States, said among other things, the following:

"The units, such as the Gestapo and SS, were fighting units and consisted of volunteers, particularly fanatical people." To what extent that is true of the SS, I don't know. So far as the Gestapo is concerned, it certainly is not true, for, the Gestapo was anorganization founded by Goering on the basis of the law of 22 April 1942. It was a police organization just like the criminal police or ordinance police were responsible for keeping communications open. It consisted in the greatest part of the professional officials who, in part, had been police officials long before the creation of the Gestapo and who, on the creation of this police organization, were ordered, commanded, or appointed to positions in the Gestapo. According to the laws affecting public officials in the Reich at that time, these officials were obliged to take these positions. They were never voluntary members of the Gestapo. It might perhaps be that one percent of the Gestapo were voluntary members of the Gestapo. The rest were forced into that membership on the basis of the laws I have just cited. That is all that I have to mention at the moment. I should like, however, permission to continue.

THE PRESIDENT: Yes, certainly. We will adjourn now.

(The Tribunal adjourned until 1 March, 1946 at 1000 hours)